

9-28-2016

## State v. Hudson Clerk's Record Dckt. 44418

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, IDAHO STATE	)	SUPREME COURT NO. 44418
BOARD OF LAND COMMISSIONERS	)	BONNER COUNTY CV-2015-1075
And IDAHO DEPARTMENT OF LANDS,	)	
Plaintiff/ Respondent,	)	
	)	
vs.	)	CLERK'S
	)	RECORD ON APPEAL
PHILIP HUDSON	)	
	)	
	)	
Defendant/ Appellant,	)	
_____	)	

CLERK'S RECORD ON APPEAL

Appealed from the District Court of the First Judicial District of the State of Idaho, in and for the  
County of Bonner.

HONORABLE JUDGE BUCHANAN  
District Judge

John F. Magnuson  
Attorney at Law  
P.O. Box 2350  
Coeur d'Alene, Idaho 83814

ATTORNEY FOR APPELLANT

Lawrence G. Wasden  
Attorney General  
P.O. Box 83720  
Boise, Idaho 83720-0010

ATTORNEY FOR RESPONDENT



## Other Claims

Date		Judge
7/13/2015	New Case Filed - Other Claims	Barbara A. Buchanan
	Plaintiff: State Of Idaho Appearance Steven J. Schuster	Barbara A. Buchanan
	Plaintiff: Idaho Board of Land Commissioners Appearance Steven J. Schuster	Barbara A. Buchanan
	Plaintiff: Idaho Department of Lands Appearance Steven J. Schuster	Barbara A. Buchanan
	Filing: AA- All initial civil case filings in District Court of any type not listed in categories E, F and H(1) Paid by: State Of Idaho (plaintiff) Receipt number: 0010615 Dated: 7/24/2015 Amount: \$.00 (Cash) For: Idaho Board of Land Commissioners (plaintiff), Idaho Department of Lands (plaintiff) and State Of Idaho (plaintiff)	Barbara A. Buchanan
	Verified Complaint Filed	Barbara A. Buchanan
	Summons Issued- Original to File	Barbara A. Buchanan
7/24/2015	Summons: Document Service Issued: on 7/24/2015 to Philip Hudson; Assigned to . Service Fee of \$0.00. Summons Issued- Original to Copy	Barbara A. Buchanan
8/3/2015	Acceptance Of Service	Barbara A. Buchanan
9/21/2015	Defendant: Hudson, Philip Appearance John F. Magnuson	Barbara A. Buchanan
	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: John F. Magnuson Receipt number: 0013897 Dated: 9/23/2015 Amount: \$136.00 (Check) For: Hudson, Philip (defendant)	Barbara A. Buchanan
10/9/2015	State of Idaho's Reply to Counterclaim	Barbara A. Buchanan
10/15/2015	Notice of Discovery	Barbara A. Buchanan
10/27/2015	Hearing Scheduled (Scheduling Conference 12/11/2015 01:45 PM)	Barbara A. Buchanan
	Notice of Scheduling Conference	Barbara A. Buchanan
10/28/2015	Notice of Service (State of Idaho's First Interrogatories, Request for Production and Requests for Admissions)	Barbara A. Buchanan
11/4/2015	Letter From Mr. Magnuson - Requesting to Reset Scheduling Conference	Barbara A. Buchanan
11/5/2015	Hearing result for Scheduling Conference scheduled on 12/11/2015 01:45 PM: Continued	Barbara A. Buchanan
	Hearing Scheduled (Scheduling Conference 01/08/2016 01:30 PM)	Barbara A. Buchanan
	Amended Notice of Scheduling Conference	Barbara A. Buchanan
11/12/2015	Notice of Service (First Set of Continuing Interrogatories and Requests for Production of Documents to Plaintiffs/Counterclaim Defendants)	Barbara A. Buchanan
11/24/2015	Notice of Discovery	Barbara A. Buchanan
11/25/2015	Defendant/Counterclaim Plaintiff Philip Hudson's Motion for Extension of Time within Which to Answer the State of Idaho's " First Interrogatories, Requests for Production and Requests for Admissions"	Barbara A. Buchanan
	Declaration of John F. Magnuson in Support of Defendant/Counterclaim Plaintiff Philip Hudson's Motion for Extension of Time within which to Answer the State of Idaho's "First Interrogatories, Requests for Admissions"	Barbara A. Buchanan

## Other Claims

Date		Judge
1/8/2016	Hearing result for Scheduling Conference scheduled on 01/08/2016 01:30 PM: District Court Hearing Held Court Reporter: Bryl Cinnamon Number of Transcript Pages for this hearing estimated: Less Than 100 Pages  Court Minutes Hearing type: Scheduling Conference Hearing date: 1/8/2016 Time: 1:38 pm Courtroom: Court reporter: Bryl Cinnamon Minutes Clerk: Linda Oppelt Tape Number: 1 Steven Schuster by phone John Magnuson by phone	Barbara A. Buchanan          Barbara A. Buchanan
1/13/2016	Order Setting Trial And Pretrial Order	Barbara A. Buchanan
	Hearing Scheduled (Pretrial Conference 08/19/2016 02:00 PM)	Barbara A. Buchanan
	Hearing Scheduled (Court Trial - 5 Days 09/26/2016 09:00 AM)	Barbara A. Buchanan
1/22/2016	Motion To Disqualify Pursuant to I.R.C.P. 40(d)(1)(A) and (G) - by Plaintiff - Judge Mitchell - Alternate Judge	John T. Mitchell
2/1/2016	Order Granting Disqualification - by Plaintiff - Judge Mitchell - Alternate Judge	John T. Mitchell
	Disqualification Of Judge - Automatic - by Plaintiff - Judge Mitchell - Alternate Judge	John T. Mitchell
3/9/2016	Notice of Appearance and Substitution of Counsel - Attorney S. Schuster withdraws / Attorney A. Kaufmann appearance  Plaintiff: State Of Idaho Appearance Angela Schaer Kaufmann	Barbara A. Buchanan  Barbara A. Buchanan
3/17/2016	Hearing Scheduled (Status Conference 04/06/2016 09:15 AM)  Notice Of Hearing	Barbara A. Buchanan  Barbara A. Buchanan
3/24/2016	Letter from Attorney Magnuson re: Appearing be phone for the hearing set April 06, 2016 09:15am	Barbara A. Buchanan
3/25/2016	Notice of Discovery	Barbara A. Buchanan
3/28/2016	Notice of Withdrawal of Defendant/Counterclaim Plaintiff Philip Hudson's Motion for Extension of Time ( State of Idaho's First Interrogatories, Requests for Production, and Requests for Admissions)	Barbara A. Buchanan
4/6/2016	Court Minutes Hearing type: Status Conference re Resetting Court Trial Hearing date: 4/6/2016 Time: 1:50 am Courtroom: Court reporter: None Minutes Clerk: Susan Ayerle Tape Number: 1 Angela Kaufmann telephonically for PI John Magnuson telephonically for Def	Barbara A. Buchanan

## Other Claims

Date		Judge
4/6/2016	Hearing result for Status Conference scheduled on 04/06/2016 09:15 AM: District Court Hearing Held Court Reporter: None Number of Transcript Pages for this hearing estimated: Less than 100 pages Re: Resetting of Court Trial (Angela Kaufmann by phone) (John Magnuson by phone)  Continued (Court Trial - 5 Days 11/29/2016 09:00 AM)	Barbara A. Buchanan
4/7/2016	Deposition Subpoena Duces Tecum and Notice of Deposition: Idaho Department of Water Resources	Barbara A. Buchanan
4/11/2016	Affidavit of Service re: Deposition Subpoena Duces Tecum and Notice of Deposition: Idaho Department of Water Resources	Barbara A. Buchanan
4/13/2016	Notice of Cancellation of Deposition Subpoena Duces Tecum and Notice of Deposition: IDaho Department of Water Resources	Barbara A. Buchanan
	Notice of Cancellation of Deposition Subpoena Duces Tecum and Notice of Deposition: Idaho Department of Water Resources	Barbara A. Buchanan
4/18/2016	Continued (Pretrial Conference 10/21/2016 01:45 PM)	Barbara A. Buchanan
	OrderSetting Trial And Pretrial Order	Barbara A. Buchanan
	State of Idaho's Motion for Partial Judgment re: State of Idaho's First Claim for Relief	Barbara A. Buchanan
	Notice of Hearing re: State of Idaho's Motion for Summary Judgment	Barbara A. Buchanan
	Hearing Scheduled (Motion for Summary Judgment 05/18/2016 02:30 PM) State of Idaho's Motion for Summary Judgment	Barbara A. Buchanan
	Memorandum in Support of the State of Idaho's Motion for Summary Judgment	Barbara A. Buchanan
	Affidavit of Mick Schanilec	Barbara A. Buchanan
	Affidavit of Matthew Anders	Barbara A. Buchanan
4/22/2016	Amended Notice Of Hearing Re: Motion for Summary Judgment	Barbara A. Buchanan
4/25/2016	Continued (Motion for Summary Judgment 06/22/2016 03:30 PM) State of Idaho's Motion for Summary Judgment	Barbara A. Buchanan
	Amended Notice Of Hearing	Barbara A. Buchanan
5/5/2016	Notice Of Service First Supplemental Response to Interrogatories, Request for Production	Barbara A. Buchanan
6/9/2016	Memorandum in Opposition to the State of Idaho's Motion for Partial Summary Judgment re: First Claim for Relief	Barbara A. Buchanan
	Declaration of Philip Hudson	Barbara A. Buchanan
	Declaration of Ernest M. Warner, PLS	Barbara A. Buchanan
	Declaration of Drew C. Dittman, P.E.	Barbara A. Buchanan
	*****END OF FILE #1***BEGIN FILE #2***** ****BEGIN EXPANDO #1*****	Barbara A. Buchanan
6/15/2016	Motion to Strike Portions of the Declaration of Ernest M. Warner, PLS and Memorandum in Support	Barbara A. Buchanan

## Other Claims

Date		Judge
6/15/2016	Reply Memorandum in Support of State's Motion for Partial Summary Judgment re: State of Idaho's First Claim for Relief	Barbara A. Buchanan
	Second Affidavit of Mick Schanilec	Barbara A. Buchanan
6/17/2016	Notice of Hearing re: Plaintiff's Motion to Strike Portions of the Declaration of Ernest M. Warner PLS	Barbara A. Buchanan
	Hearing Scheduled (Motion 06/22/2016 03:30 PM) Plaintiff's Motion to Strike Portions of the Declaration of Ernest M. Warner, PLS	Barbara A. Buchanan
	Motion to Strike the "Second Affidavit of Mick Schanilec" (Filed by the Plaintiff on June 15, 2016)	Barbara A. Buchanan
	Memorandum in Support of Motion to Strike the "Second Affidavit of Mick Schanilec" (Filed by the Plaintiff on June 15, 2016)	Barbara A. Buchanan
	Motion to Shorten Time	Barbara A. Buchanan
	Hearing Scheduled (Motion 06/22/2016 03:30 PM) Defendant Hudson Motion to Shorten Time	Barbara A. Buchanan
	Hearing Scheduled (Motion 06/22/2016 03:30 PM) Defendant's Motion to Strike the Second Affidavit of Mick Schanilee	Barbara A. Buchanan
6/20/2016	State's Response to Defendant's Motion to Strike the Second Affidavit of Mick Schanilec	Barbara A. Buchanan
	Memorandum in Opposition to Motion to Strike and Declaration of Ernest M. Warner, PLS	Barbara A. Buchanan
6/22/2016	Court Minutes Hearing type: Motion for Partial Summary Judgment Hearing date: 6/22/2016 Time: 3:26 pm Courtroom: Court reporter: Valerie Larson Minutes Clerk: Linda Oppelt Tape Number: 1 Andrew Smith Angela Kaufmann John Magnuson Philip Hudson	Barbara A. Buchanan
	Hearing result for Motion for Summary Judgment scheduled on 06/22/2016 03:30 PM: District Court Hearing Held Court Reporter: Valerie Larson Number of Transcript Pages for this hearing estimated: Less Than 100 Pages	Barbara A. Buchanan
	Hearing result for Motion scheduled on 06/22/2016 03:30 PM: Hearing Vacated Defendant's Motion to Strike the Second Affidavit of Mick Schanilee	Barbara A. Buchanan
	Hearing result for Motion scheduled on 06/22/2016 03:30 PM: Hearing Vacated Defendant Hudson Motion to Shorten Time	Barbara A. Buchanan
	Hearing result for Motion scheduled on 06/22/2016 03:30 PM: Hearing Vacated Plaintiff's Motion to Strike Portions of the Declaration of Ernest M. Warner, PLS	Barbara A. Buchanan



## Other Claims

Date		Judge
6/30/2016	Memorandum Decision and Order Granting Plaintiffs' Motion for Partial Summary Judgment	Barbara A. Buchanan
7/14/2016	Notice of Submission of Proposed Injunctions	Barbara A. Buchanan
7/15/2016	Mandatory and Permanent Injunctions	Barbara A. Buchanan
7/20/2016	Stipulation for Entry of Rule 54(B) Judgment	Barbara A. Buchanan
7/22/2016	Partial Judgment	Barbara A. Buchanan
	Civil Disposition entered for: Hudson, Philip, Defendant; Idaho Board of Land Commissioners, Plaintiff; Idaho Department of Lands, Plaintiff; State Of Idaho, Plaintiff. Filing date: 7/22/2016	Barbara A. Buchanan
7/27/2016	Stipulation for Stay of Further Action on Remaining Claims and Counterclaims	Barbara A. Buchanan
	Notice to Counsel	Barbara A. Buchanan
7/28/2016	Amended Partial Judgment - Rule 54(B) Certificate	Barbara A. Buchanan
	Order Stay of Further Action on Remaining Claims	Barbara A. Buchanan
	Civil Disposition entered for: Hudson, Philip, Defendant; Idaho Board of Land Commissioners, Plaintiff; Idaho Department of Lands, Plaintiff; State Of Idaho, Plaintiff. Filing date: 7/28/2016	Barbara A. Buchanan
	Civil Disposition entered for: Hudson, Philip, Defendant; Idaho Board of Land Commissioners, Plaintiff; Idaho Department of Lands, Plaintiff; State Of Idaho, Plaintiff. Filing date: 7/28/2016	Barbara A. Buchanan
	Hearing result for Court Trial - 5 Days scheduled on 11/29/2016 09:00 AM: Hearing Vacated	Barbara A. Buchanan
	Hearing result for Pretrial Conference scheduled on 10/21/2016 01:45 PM: Hearing Vacated	Barbara A. Buchanan
	STATUS CHANGED: inactive	Barbara A. Buchanan
8/12/2016	NOTICE OF APPEAL	Idaho Supreme Court
	Change Assigned Judge	Idaho Supreme Court
8/15/2016	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: John F. Magnuson, Attorney at Law Receipt number: 0012044 Dated: 8/15/2016 Amount: \$129.00 (Check) For: Hudson, Philip (defendant)	Idaho Supreme Court
	Bond Posted - Cash (Receipt 12047 Dated 8/15/2016 for 100.00)	Barbara A. Buchanan
8/16/2016	Clerk's Certificate Of Appeal sent to ISC; copy to file	Idaho Supreme Court
8/18/2016	Letter from Counsel, John F. Magnuson, advising Court of Appeal and Notice of Counsel filed July 28, 2016 filed contemporaneous with Court's Order staying further proceedings.	Idaho Supreme Court

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division

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FAX: (208) 854-8072

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

2015 JUL 13 AM 11 23

CLERK DISTRICT COURT  
KB  
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Plaintiffs,

vs.

PHILIP HUDSON

Defendant.

) Case No. CV-2015-1075

) VERIFIED COMPLAINT

) Fee category: Exempt

Plaintiffs State of Idaho, Idaho State Board of Land Commissioners ("Board")  
and the Idaho Department of Lands ("IDL"), hereinafter collectively referred to as  
"State," by and through the Attorney General for the State of Idaho, for a cause of action  
allege as follows:

**ASSIGNED TO  
JUDGE BUCHANAN**

## NATURE OF THE CASE

1. This is an action under the provisions of the Idaho Lake Protection Act, Idaho Code title 58, chapter 13 (“LPA”) and the associated administrative rules enacted thereunder, IDAPA 20.03.04 (“LPA Rules”), and a trespass action pursuant to Idaho Code § 58-312, seeking (a) a mandatory injunction ordering the defendant to restore Priest Lake to its original condition by removal of an unauthorized encroachment, a fill comprised of concrete, rocks and dirt, on, in and above the beds and waters of Priest Lake in Bonner County, Idaho, and performance of other measures recommended by the State; (b) a prohibitory injunction ordering defendant to refrain from future encroachments on Priest Lake without prior authorization from the State; (c) imposition of a civil penalty; and (d) attorney fees and costs.

## AUTHORITY

2. The State of Idaho owns the beds and banks of all navigable rivers and lakes in Idaho, to the ordinary high water mark, in trust, for the people of the State of Idaho.

3. The LPA and associated administrative rules authorize the Board to regulate and control encroachments on, in or above the beds of navigable lakes. Idaho Code § 58-1303; *see also* Idaho Code § 58-104(9) (Board authorized to direct and control disposition and use of the beds of navigable waters in Idaho).

4. Idaho Code § 58-1301 prohibits encroachments on, in or above the beds or waters of any navigable lake in the state of Idaho unless approval has been given for such by the Board as provided in the LPA.

5. IDAPA 20.03.04.012.02 prohibits encroachments on, in or above the beds or waters of any navigable lake in the state of Idaho unless approval for such has been given as provided in the LPA Rules.

6. Priest Lake is a navigable lake under the laws of the State of Idaho.

7. The Attorney General of the state of Idaho, in his official capacity, is empowered to represent the State in this action pursuant to Idaho Code §§ 58-120 and 67-1401.

### **PARTIES**

8. Pursuant to Idaho Code §§ 58-101 and 119, IDL exercises the rights, powers and duties of the Board.

9. Plaintiffs appear by and through the Board and IDL.

10. Defendant Philip Hudson (“Hudson”) resides at E. 4606 Lane Park Road, Mead, WA 99021, and owns, uses or possesses land adjacent to the beds and waters of Priest Lake in the South Shores Subdivision, Lot 29, in Section 3, Township 61 North, Range 4 West, Boise Meridian, in Bonner County, Idaho.

11. Venue for this action lies in Bonner County, Idaho, because it is the site where the cause of action arose, the unauthorized encroachment is located on real property located within Bonner County, and the action seeks the recovery of a civil statutory penalty.

### **FACTS**

12. In July 2014, IDL staff was investigating lake encroachments on Priest Lake and observed what appeared to be an elevated beach retained with a sea wall adjacent to the property described in Paragraph 10, *supra*. Subsequent investigation and



review of past aerial photographs show that after Lake Encroachment Permit No. L-97-S-983 was issued to Philip Hudson in 1997, fill material was placed below the ordinary high water mark of Priest Lake. Closer examination eventually showed that the unauthorized fill extends approximately 40-feet along the shoreline and between 20 and 25 feet into the lake. The fill consists of approximately 50 cubic yards of concrete, rock and dirt.

13. On or about July 17, 2014, IDL sent a letter to Hudson explaining that IDL had observed the unauthorized fill into the waters of Priest Lake adjacent to his property, and requesting that he submit a plan for removal of the fill within thirty (30) days of the date of the letter.

14. In response to the July 17, 2015, letter from IDL, counsel for Hudson sent letters to IDL on August 6, August 29, September 25, November 3, December 2, 2014, and January 30, 2015, chronicling efforts of Hudson and counsel to obtain a consultant's report in response to IDL's demand for removal of the unauthorized fill.

15. On or about March 16, 2015, counsel for Hudson sent IDL a letter accompanied by a consultant's report on the unauthorized fill and offering to pay to lease the lakebed on which the fill was located if IDL would not require removal of the fill.

16. IDL responded to the March 16, 2015, letter from Hudson's counsel with a letter from State counsel on April 28, 2015, rejecting the offer to lease the lakebed for the area filled, and demanding that Hudson submit a plan for removal of the fill within sixty (60) days. To date, Hudson has not responded to IDL's latest demand, and has not taken any action to remove the unauthorized fill.

17. In addition to the large unauthorized fill, IDL identified three (3) small seawalls that were constructed at and below the ordinary high water mark of Priest Lake adjacent to the Hudson property. In its April 28, 2015, demand to Hudson's counsel, IDL notified Hudson that the three (3) minor seawalls along the shoreline could be permitted by IDL after-the-fact, but that Hudson would need to submit an application for a lake encroachment permit to IDL to obtain a permit for those structures.

**FIRST CLAIM FOR RELIEF: VIOLATION OF THE LAKE PROTECTION  
ACT AND DEMAND FOR REMOVAL OF THE UNAUTHORIZED FILL**

18. The allegations set forth in Paragraph 1 through 17 of this Complaint are incorporated in this claim for relief as if set forth fully herein.

19. Hudson has constructed and maintained the above-identified encroachments, the unauthorized fills and seawalls, in violation of Idaho Code §§ 58-1301 and 1303, and the LPA Rules, specifically Rule 012.02.

20. Hudson has failed to obey an order of the Board to remove the large fill and submit an after-the-fact application for a lake encroachment permit for the three (3) minor seawalls after notification.

21. The unauthorized construction and maintenance of the fills and seawalls by Hudson has damaged and continues to damage the rights of the public to use the public waters and public resources, including fish and wildlife habitat, recreation, aesthetic beauty, navigation and water quality of Priest Lake.

22. IDL is entitled to a civil penalty for violation of the LPA, and is entitled to attorney fees and costs in prosecuting this action.

## **SECOND CLAIM FOR RELIEF: TRESPASS ON STATE LANDS AND INJUNCTIVE RELIEF**

23. The allegations set forth in Paragraph 1 through 22 of this Complaint are incorporated in this claim for relief as if set forth fully herein.

24. Hudson intentionally entered the bed of Priest Lake below the ordinary high water mark adjacent to Hudson's property and placed approximately fifty (50) cubic yards of concrete, rocks and dirt material without authorization from IDL.

25. Hudson has remained in possession of the State-owned bed of Priest Lake to the present time without the consent of and without continuously holding a lease from the State of Idaho for the above-referenced lake encroachments.

26. Pursuant to Idaho Code § 58-312, "[a]ll persons using or occupying any state land without a lease from the state . . . shall be regarded as . . . trespassers . . ."

### **REQUEST FOR ATTORNEY FEES**

27. The allegations set forth in Paragraph 1 through 26 of this Complaint are incorporated in this claim for relief as if set forth fully herein.

28. IDL is entitled to an award of attorney's fees and costs incurred in connection with this matter against Hudson, pursuant to Idaho law, including, but not limited to, Idaho Code § 12-117.

### **RELIEF SOUGHT BY THE STATE OF IDAHO UNDER THE FIRST CLAIM FOR RELIEF**

1. That pursuant to Idaho Code §§ 58-1308 and 1309, the Court (a) issue a mandatory injunction ordering Hudson to remove all unauthorized fills during the low water period of Priest Lake, from between about November 1 and March 1, (b) stabilize any unstable bank or lake bed remaining landward of the ordinary high water mark of

Priest Lake, and (c) perform any other measures recommended by IDL designed to contain sediment and erosion and to restore the lake to as near its condition immediately prior to the unauthorized encroachment as possible.

2. That pursuant to Idaho Code § 58-1308 the Court issue a permanent injunction ordering Hudson to refrain from encroaching on, in or above the beds or waters of Priest Lake unless and until approval therefore is obtained from IDL as provided in the LPA.

3. That pursuant to Idaho Code § 58-1308 Hudson be fined ten thousand dollars (\$10,000) for violation of the LPA, Idaho Code §§ 58-1301 and 1302 and violation of Rule 012.02 of the LPA Rules, and for failure to comply with the State's order to remove the fill from the bed of Priest Lake.

4. For such other relief as the Court may deem equitable and just.

**RELIEF SOUGHT BY THE STATE OF IDAHO UNDER THE SECOND CLAIM  
FOR RELIEF**

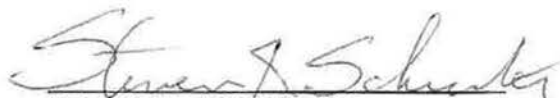
1. That preliminary and permanent injunctions be issued to compel the removal of the fill from State land and to enjoin Hudson, his agents, employees, contractors and assigns from occupying State-owned lake bed adjacent to the Hudson property as described in Paragraph 10, *supra*, without a lease from the State of Idaho.

2. That any injunction (a) order Hudson to remove all unauthorized fills during the low water period of Priest Lake, from between about November 1 and March 1, (b) stabilize any unstable bank or lake bed remaining landward of the ordinary high water mark of Priest Lake, and (c) perform any other measures recommended by IDL

designed to contain sediment and erosion and to restore the lake to as near its condition immediately prior to the unauthorized encroachment as possible.

3. For such other relief as the Court may deem equitable and just.

DATED this 8<sup>th</sup> day of July, 2015


  
STEVEN J. SCHUSTER  
Deputy Attorney General  
Idaho Department of Lands

**VERIFICATION**

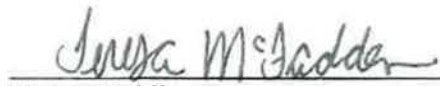
STATE OF IDAHO                    )  
  ) s.s.  
COUNTY OF KOOTENAI        )

Eric Besaw, being first duly sworn upon oath, deposes and says:

That he is the Operations Chief-North for the Idaho Department of Lands, and has read the foregoing STATE OF IDAHO'S VERIFIED COMPLAINT, that he knows the contents thereof, and that the same are true to the best of his knowledge.

  
ERIC BESAW  
Operations Chief - North  
Idaho Department of Lands

SUBSCRIBED and sworn to before me this 8<sup>th</sup> day of July, 2015.

  
Notary Public  
Residing at: Coeur d'Alene Idaho  
Commission Expires: 3/25/20



JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

Attorney for Defendant



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

---

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Counterclaim Defendants.

NO. CV-15-1075

**ANSWER AND COUNTERCLAIM**

**FEE CATEGORY: I.1**

**FEE: \$136.00**

COMES NOW Defendant Philip Hudson, by and through his attorney of record, John F.

**ANSWER AND COUNTERCLAIM - PAGE 1**

Magnuson, by way of answer and counterclaim, and avers and alleges as set forth herein.

**ANSWER.**

1. By way of answer to the allegations contained in Paragraph 1, Defendant Hudson states that said allegations constitute statements of law to which no answer is required. To the extent that Paragraph 1 alleges matters of fact, said allegations are denied, including the denial of the State of Idaho's entitlement to any relief as outlined in Paragraph 1.

2. By way of answer to the allegations contained in Paragraph 2, Defendant Hudson admits that the State of Idaho owns title to the submerged bed of Priest Lake, extending to the ordinary high watermark, as it existed on July 3, 1890. To the extent that Paragraph 2 alleges otherwise, said allegations are denied.

3. By way of answer to the allegations contained in Paragraph 3, Defendant Hudson admits that the terms and provisions of Idaho Code §§58-104(9) and 58-1303 speak for themselves. To the extent that Paragraph 3 alleges otherwise, said allegations are denied. Defendant Hudson specifically denies that any of the encroachments that are described in the Verified Complaint lie below the ordinary high watermark of Priest Lake as it existed on July 3, 1890.

4. By way of answer to the allegations contained in Paragraph 4, Defendant Hudson admits that the terms and provisions of Idaho Code §58-1301 are as stated therein. To the extent that Paragraph 4 alleges otherwise, said allegations are denied. Defendant Hudson specifically denies that any encroachments described in Plaintiff's Complaint lie below the ordinary high watermark of Priest Lake as it existed on July 3, 1890.

5. By way of answer to the allegations contained in Paragraph 4, Defendant Hudson admits that the terms and provisions of IDAPA 20.03.04.012.02 are as stated therein. To the extent



that Paragraph 4 alleges otherwise, said allegations are denied. Defendant Hudson specifically denies that any encroachments described in Plaintiff's Complaint lie below the ordinary high watermark of Priest Lake as it existed on July 3, 1890.

6. Defendant admits the allegations contained in Paragraph 6.

7. By way of answer to the allegations contained in Paragraph 7, Defendant Hudson admits that the terms of Idaho Code §§58-1201 and 67-1401 speak for themselves. To the extent that Paragraph 7 alleges otherwise, said allegations are denied.

8. Defendant admits the allegations contained in Paragraph 8.

9. Defendant admits the allegations contained in Paragraph 9.

10. Defendant admits the allegations contained in Paragraph 10.

11. By way of answer to the allegations contained in Paragraph 11, Defendant Hudson admits that venue is proper in Bonner County but denies the remaining allegations contained therein, including but not limited to the Plaintiffs' allegation that Hudson has maintained any unauthorized encroachments or that the Plaintiffs are entitled to a civil statutory penalty.

12. By way of answer to the allegations contained in Paragraph 12, Defendant Hudson admits and denies as follows: Defendant is without information sufficient to form a belief as to the truth or falsity of the allegations contained in the first sentence of Paragraph 12 and therefore denies the same; Defendant denies the allegations contained in the second sentence of Paragraph 12; Defendant denies the allegations contained in the third sentence of Paragraph 12; and Defendant denies the allegations contained in the fourth sentence of Paragraph 12.

13. By way of answer to the allegations contained in Paragraph 13, Defendant Hudson admits that IDL sent a letter to Hudson on or about July 17, 2014. Defendant denies the factual or



legal accuracy of matters alleged in the letter but admits that IDL requested a response within thirty (30) days. To the extent not otherwise admitted, the allegations contained in Paragraph 13 are denied.

14. By way of answer to the allegations contained in Paragraph 14, Defendant admits sending the responses noted but denies that he was in violation of any code or administrative authorities as alleged by Plaintiff.

15. By way of answer to the allegations contained in Paragraph 15, Defendant Hudson admits that his counsel sent a letter dated March 16, 2015, proposing an offer of settlement governed by IRE 408 and not otherwise admissible for purposes of establishing liability. Defendant denies liability as alleged herein by Plaintiff. To the extent not otherwise admitted, the allegations contained in Paragraph 15 are denied.

16. By way of answer to the allegations contained in Paragraph 16, Defendant admits that the State sent a response on April 28, 2015, rejecting the IRE 408 proposal advanced by Hudson and again requesting a plan for removal of the alleged fill. Defendant denies that he placed fill or encroachments waterward of the ordinary high watermark of Priest Lake as it existed on July 3, 1890 and further denies the remaining allegations contained in Paragraph 16.

17. By way of answer to the allegations contained in Paragraph 17, Defendant Hudson admits that the contents of IDL's April 28, 2015 letter speak for themselves. To the extent that Paragraph 17 alleges otherwise, Defendant Hudson denies the same. Defendant Hudson further denies that he violated any of the statutory or administrative authorities cited by Plaintiff.

18. By way of answer to the allegations contained in Paragraph 18, Defendant incorporates herein as though set forth in full the admissions and denials contained in Paragraphs

1 through 17 above.

19. Defendant denies the allegations contained in Paragraph 19.

20. Defendant denies the allegations contained in Paragraph 20.

21. Defendant denies the allegations contained in Paragraph 21.

22. Defendant denies the allegations contained in Paragraph 22.

23. By way of answer to the allegations contained in Paragraph 23, Defendant incorporates herein as though set forth in full the admissions and denials contained in Paragraph 1 through 22 above.

24. Defendant denies the allegations contained in Paragraph 24.

25. Defendant denies the allegations contained in Paragraph 25.

26. By way of answer to the allegations contained in Paragraph 26, Defendant admits that Idaho Code § 58-312 speaks for itself and, to the extent Paragraph 26 alleges otherwise, said allegations are denied.

27. By way of answer to the allegations contained in Paragraph 27, Defendant incorporates herein as though set forth in full the admissions and denials contained in Paragraph 1 through 26 above.

28. Defendant denies the allegations contained in Paragraph 28.

29. Defendant denies the Plaintiffs' entitlement to the relief requested at Paragraphs 1 through 4 of pages 6-7 of Plaintiffs' Verified Complaint.

30. Defendant denies the Plaintiffs' entitlement to the relief requested at Paragraphs 1 through 3 of pages 7-8 of Plaintiffs' Verified Complaint.

### **AFFIRMATIVE DEFENSES.**

COMES NOW Defendant Hudson, by and through his attorney of record, John F. Magnuson, by way of further answer, and avers and alleges as set forth herein:

31. Defendant Hudson incorporates herein as affirmative defenses the admissions and denials contained in Paragraphs 1 through 30 above.

32. Plaintiff has failed to state a claim upon which relief can be granted.

33. Plaintiff's claims relate to property and activities occurring above the ordinary high watermark of Priest Lake, as it existed on July 3, 1890, and are outside of the jurisdiction and control of the Plaintiffs.

34. The ordinary high watermark of Priest Lake, as of July 3, 1890, uninfluenced by manmade activities and/or dams, is located at an elevation below the furthest waterward extension of any encroachments on the Defendants' property.

35. Discovery is ongoing and Defendant Hudson reserves the right to supplement this answer with further affirmative defenses as warranted.

### **COUNTERCLAIMS.**

COMES NOW Defendant Philip Hudson, as Counterclaim Plaintiff, pursuant to IRCP 13, and avers and alleges as set forth herein:

#### **A. Parties.**

1. Counterclaim Plaintiff Philip Hudson ("Hudson") owns littoral property adjacent to Priest Lake in the South Shores Subdivision, Lot 29, in Section 3, Township 61 North, Range 4 West, Boise Meridian, in Bonner County, Idaho.

2. The Counterclaim Defendants consist of the State of Idaho, Idaho State Board of Land

Commissioners, and Idaho Department of Lands, all parties and entitles claiming an interest in the submerged beds of Priest Lake lying below the ordinary high watermark as it existed on July 3, 1890.

**B. Jurisdiction and Venue.**

3. Jurisdiction and venue are proper before this Court. This action relates to real property located in Bonner County, Idaho and relates to the competing interests and claims thereto as asserted by Hudson and the Counterclaim Defendants.

**C. Factual Allegations.**

4. Hudson owns certain littoral property located on Priest Lake in Bonner County, Idaho, described in more particularity as South Shore Subdivision, Lot 29, in Section 3, Township 61 North, Range 4 West, Boise Meridian. Said property is littoral property.

5. The boundary between the Hudson littoral property and the submerged beds of Priest Lake is determined by the location of the ordinary high watermark of Priest Lake as it existed on July 3, 1890.

6. After statehood, and the determinative time for fixing the location of the ordinary high watermark, artificial structures were placed at the outlet of Priest Lake so as to maintain spring runoff during the summer growing season and to artificially increase the elevation of Priest Lake during the summer growing season. These artificial works and contrivances had the effect of creating an artificial watermark on Priest Lake which is neither natural nor ordinary, the same being influenced by manmade activities and dams.

7. Counterclaim Defendants allege that Hudson has caused to be constructed or maintained encroachments that lie waterward of the ordinary high watermark. Hudson denies said allegation and claims that any encroachments on or at the Hudson property are located above the

ordinary high watermark as it existed on July 3, 1890, prior to the construction of any artificial works or means thereafter used to raise the level of Priest Lake from its “ordinary” level to an “artificial” level.

8. A dispute has arisen by and between the parties as to the location of the littoral boundary line of the Hudson property. That dispute is ripe for review and touches and affects the parties’ rights and relations.

**D. Counterclaims.**

**a. Counterclaim 1: Declaratory Relief.**

9. Hudson incorporates herein as though set forth in full the admissions and denials contained in Paragraphs 1 through 35 of his Answer and Affirmative Defenses and Paragraphs 1 through 8 of these Counterclaims.

10. Pursuant to the Uniform Declaratory Judgments Act, I.C. §10-1201, et seq., Hudson is entitled to entry of declaratory relief adjudging and decreeing that the encroachments on the Hudson parcel are located upland of the ordinary high watermark of Priest Lake as it existed on July 3, 1890.

**b. Counterclaim 2: Quiet Title.**

11. Hudson incorporates herein as though set forth in full the admissions and denials contained in Paragraphs 1 through 35 of his Answer and Affirmative Defenses and Paragraphs 1 through 10 of these Counterclaims.

12. Hudson seeks entry of a judgment quieting title in and to all real property lying under or upland of any waterward encroachments presently located on the Hudson property.

13. Hudson seeks entry of judgment declaring and decreeing that any and all persons and

parties, including but not limited to Counterclaim Defendants, be restrained and enjoined from interfering with Hudson's private use and enjoyment of said encroachments.

**PRAYER FOR RELIEF**

WHEREFORE, Defendant/Counterclaim Plaintiff Philip Hudson prays for relief as follows:

1. That Plaintiffs' Complaint be dismissed in its entirety and that Plaintiff take nothing thereby;
2. For entry of declaratory relief on Hudson's first counterclaim (under the Uniform Declaratory Judgments Act, I.C. §10-1201, et seq.), declaring and decreeing that the encroachments currently located on the Hudson property lie upland of the ordinary high watermark of Priest Lake as it existed on July 3, 1890;
3. For entry of a judgment quieting title in and to those portions of the Hudson property upon which any or all of the encroachments at issue in this proceeding are located, and enjoining Plaintiffs/Counterclaim Defendants and any and all persons or parties from interfering with Hudson's quiet use of the same;
4. For an award of reasonable attorney fees and costs as incurred herein, pursuant to Idaho law, including but not limited to Idaho Code §§12-117 and 12-121; and
5. For such other and further relief as the Court deems just and equitable.

DATED this 17<sup>th</sup> day of September, 2015.

  
\_\_\_\_\_  
JOHN F. MAGNUSON  
Attorney for Defendant/Counterclaim Plaintiff



CERTIFICATE OF SERVICE

I hereby certify that on this 17<sup>th</sup> day of September, 2015, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Steven J. Schuster  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
P.O. Box 83720  
Boise, ID 83720

X U.S. MAIL  
       E-MAIL TRANSMISSION  
       HAND DELIVERED  
       OVERNIGHT MAIL  
X FACSIMILE - 208\854-8072



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HUDSON.ANSWER.wpd

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division

STEVEN J. SCHUSTER, ISB # 3453  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
PO Box 83720  
Boise, ID 83720-0010  
Tele: (208) 334-4120  
FAX: (208) 854-8072



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

---

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Counterclaim Defendants.

---

**Case No. CV 2015-1075**

**STATE OF IDAHO'S REPLY  
TO COUNTERCLAIM**



Plaintiffs/Counterdefendants State of Idaho, Idaho State Board of Land Commissioners (“Board”) and the Idaho Department of Lands (“IDL”), hereinafter collectively referred to as “State,” by and through the Attorney General for the State of Idaho, hereby replies to the Counterclaims of the Defendant/Counterplaintiff Philip Hudson as follows:

1. The State denies each and every allegation not specifically admitted herein.
2. The State admits Paragraphs 1 through 5 of the Defendant/Counterplaintiff’s Counterclaim.
3. The State denies Paragraph 6 of the Defendant/Counterplaintiff’s Counterclaim.
4. The State admits the first sentence of Paragraph 7 of the Defendant/Counterplaintiff’s Counterclaim, but denies the remainder of said Paragraph.
5. The State denies Paragraphs 8 of the Defendant/Counterplaintiff’s Counterclaim.
6. In Paragraph 9 of the Defendant/Counterplaintiff’s Counterclaim, the Defendant/Counterplaintiff has incorporated by reference Paragraphs 1-35 of his answer and all of his affirmative defenses. No response to the answer or affirmative defenses is required by the Idaho Rules of Civil Procedure, but to the extent that a response is necessary, it is denied by the State. With respect to the incorporation by reference of Paragraphs 1 through 8 of the Defendant/Counterplaintiff’s Counterclaim, the State incorporates by reference Paragraphs 1 through 5 of its Answer to Counterclaim, *supra*.

7. The State denies Paragraph 10 of the Defendant/Counterplaintiff's Counterclaim.

8. In Paragraph 11 of the Defendant/Counterplaintiff's Counterclaim, the Defendant/Counterplaintiff has incorporated by reference Paragraphs 1-35 of his answer and all of his affirmative defenses. No response to the answer or affirmative defenses is required by the Idaho Rules of Civil Procedure, but to the extent that a response is necessary, it is denied by the State. In response to the incorporation by reference of Paragraphs 1 through 10 of the Defendant/Counterplaintiff's Counterclaim, the State incorporates by reference Paragraphs 1 through 7 of its Reply to Counterclaim, *supra*.

10. The State denies Paragraphs 12 and 13 of the Defendant/Counterplaintiff's Counterclaim and Paragraphs 1, 2, 3, 4 and 5 of the Prayer for Relief of said Counterclaim.

#### **AFFIRMATIVE DEFENSES TO COUNTERCLAIM**

1. The Defendant/Counterplaintiff's Counterclaim fails to state a claim upon which relief can be granted.

2. Defendant/Counterplaintiff is estopped from asserting ownership to the land in dispute.

3. The State owns all lands below the natural or ordinary high water mark of Priest Lake as of July 3, 1890, which is 2437.64 feet above mean sea level, datum of 1929, supplementary adjustment of 1947.

4. Defendant/Counterplaintiff, or his predecessors in interest, has dedicated the area in dispute in the action to public use.

5. The people of the state of Idaho have rights to the use of the property in dispute though the doctrine of custom.

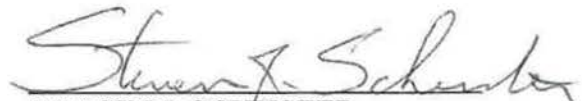
6. The Defendant/Counterplaintiff's claim to title to the land in dispute is barred by the doctrine of laches.

7. The Defendant/Counterplaintiff's claim to title to the bed of Priest Lake is barred by the applicable statute of limitations, including Idaho Code §§ 5-203 and 204.

8. The current natural or ordinary high water mark of Priest Lake is 2437.64 feet above mean sea level, datum of 1929, supplementary adjustment of 1947, and it is presumed that the State is holding the title to these lands in trust for the public.

WHEREFORE the state prays that: 1) Defendant/Counterplaintiff's Counterclaim be dismissed with prejudice and judgment be entered in the State's favor; 2) the State be awarded costs; and 3) the State be awarded attorney's fees in an amount to be proven at trial.

DATED this 7<sup>th</sup> day of October, 2015.


  
STEVEN J. SCHUSTER  
Deputy Attorney General  
Idaho Department of Lands

**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of October 2015, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

JOHN MAGNUNSON  
1250 NORTHWOOD CENTER CT STE A  
COEUR D'ALENE ID 83816

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (208) 667-0500
- ☐ E-Mail:

  
STEVEN J. SCHUSTER  
Deputy Attorney General  
Idaho Department of Lands

JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

Attorney for Defendant/Counterclaim  
Plaintiff Philip Hudson



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

NO. CV-15-1075

**DEFENDANT/COUNTERCLAIM  
PLAINTIFF PHILIP HUDSON'S  
MOTION FOR EXTENSION OF  
TIME WITHIN WHICH TO  
ANSWER THE STATE OF IDAHO'S  
"FIRST INTERROGATORIES,  
REQUESTS FOR PRODUCTION  
AND REQUESTS FOR  
ADMISSIONS"**

DEFENDANT/COUNTERCLAIM PLAINTIFF PHILIP HUDSON'S MOTION FOR EXTENSION OF TIME WITHIN WHICH TO ANSWER THE STATE OF IDAHO'S "FIRST INTERROGATORIES, REQUESTS FOR PRODUCTION AND REQUESTS FOR ADMISSIONS" - PAGE 1

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Counterclaim Defendants.

COMES NOW Defendant/Counterclaim Plaintiff Philip Hudson, by and through his attorney of record, John F. Magnuson, and respectfully moves the Court for entry of an order extending the time within which Defendant/Counterclaim Plaintiff Hudson (“Hudson”) may respond to the State of Idaho’s “First Interrogatories, Requests for Production and Requests for Admissions,” served via fax on October 26, 2015. This Motion is made pursuant to IRCP 1, 6(b), 33, and 34. This Motion is supported by the Declaration of John F. Magnuson (filed herewith).

The Plaintiff/Counterclaim Defendant (the State of Idaho) propounded discovery by facsimile on October 26, 2015. A true and correct copy of the same is attached to the Declaration of John F. Magnuson (filed herewith) at Exhibit A. Based upon the reasons set forth in the Magnuson Declaration, counsel has been unable to provide, prepare, and assemble responsive information to the Interrogatories and Requests for Production in a timely manner and request an extension of thirty (30) days within which to object or respond to said discovery requests. Hudson has answered the Request for Admission contained in the State’s initial discovery requests in a timely manner.

ORAL ARGUMENT IS NOT REQUESTED.

DATED this 24<sup>th</sup> day of November, 2015.

  
JOHN F. MAGNUSON  
Attorney for Defendant/Counterclaim Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 24<sup>th</sup> day of November, 2015, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Steven J. Schuster  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
P.O. Box 83720  
Boise, ID 83720

  X   U.S. MAIL  
      E-MAIL TRANSMISSION  
      HAND DELIVERED  
      OVERNIGHT MAIL  
  X   FACSIMILE - 208\854-8072



HUDSON-EXTENSION.MOT.wpd



JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270



Attorney for Defendant/Counterclaim  
Plaintiff Philip Hudson

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Plaintiffs,

vs.

PHILIP HUDSON.

Defendant.

NO. CV-15-1075

**DECLARATION OF JOHN F.  
MAGNUSON IN SUPPORT OF  
DEFENDANT/COUNTERCLAIM  
PLAINTIFF PHILIP HUDSON'S  
MOTION FOR EXTENSION OF  
TIME WITHIN WHICH TO  
ANSWER THE STATE OF IDAHO'S  
"FIRST INTERROGATORIES,  
REQUESTS FOR PRODUCTION  
AND REQUESTS FOR  
ADMISSIONS"**

DECLARATION OF JOHN F. MAGNUSON IN SUPPORT OF DEFENDANT/COUNTERCLAIM  
PLAINTIFF PHILIP HUDSON'S MOTION FOR EXTENSION OF TIME WITHIN WHICH TO  
ANSWER THE STATE OF IDAHO'S "FIRST INTERROGATORIES, REQUESTS FOR  
PRODUCTION AND REQUESTS FOR ADMISSIONS" - PAGE 1



PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Counterclaim Defendants.

My name is JOHN F. MAGNUSON and I make this Declaration upon my own personal knowledge and belief.

1. I am over the age of eighteen, and I make this Declaration upon my own personal knowledge and belief, and am competent to testify thereto.

2. I am the attorney of record for Defendant/Counterclaim Plaintiff Philip Hudson in the above-captioned matter.

3. Attached hereto as Exhibit A is a true and correct copy of the State of Idaho's "First Interrogatories, Requests for Production, and Requests for Admissions." Said discovery requests were received by the undersigned by facsimile on October 26, 2015.

4. Absent an extension of time, Hudson would be required to answer or object to said discovery requests by November 25, 2015.

5. The undersigned has been unable to timely prepare responses, within the thirty (30) day period as set forth in the Idaho Rules of Civil Procedure, due to commitments to other matters. The undersigned is a sole practitioner and has had commitments over the past thirty (30) days with

DECLARATION OF JOHN F. MAGNUSON IN SUPPORT OF DEFENDANT/COUNTERCLAIM  
PLAINTIFF PHILIP HUDSON'S MOTION FOR EXTENSION OF TIME WITHIN WHICH TO  
ANSWER THE STATE OF IDAHO'S "FIRST INTERROGATORIES, REQUESTS FOR  
PRODUCTION AND REQUESTS FOR ADMISSIONS" - PAGE 2

respect to other matters of litigation that have required time-sensitive action, including extensive post-trial briefing on a trial that concluded in Shoshone County on September 22; preparation and trial in Kootenai County on November 16 through 18; and numerous other transactional, administrative, and litigation matters. Further, during said thirty (30) day period, your Declarant had two (2) preplanned vacations, each involving two (2) days out of his office.

6. Your Declarant requests an additional period of time of thirty (30) more days within which to object or respond to the referenced discovery requests (Exhibit A).

I certify under penalty of perjury pursuant to the laws of the State of Idaho that the foregoing is true and correct.

DATED this 24<sup>th</sup> day of November, 2015.

  
\_\_\_\_\_  
JOHN F. MAGNUSON

CERTIFICATE OF SERVICE

I hereby certify that on this 24<sup>th</sup> day of November, 2015, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Steven J. Schuster  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
P.O. Box 83720  
Boise, ID 83720

  X   U.S. MAIL  
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       OVERNIGHT MAIL  
  X   FACSIMILE - 208\854-8072

HUDSON-EXTENSION DEC.wpd

  
\_\_\_\_\_

DECLARATION OF JOHN F. MAGNUSON IN SUPPORT OF DEFENDANT/COUNTERCLAIM  
PLAINTIFF PHILIP HUDSON'S MOTION FOR EXTENSION OF TIME WITHIN WHICH TO  
ANSWER THE STATE OF IDAHO'S "FIRST INTERROGATORIES, REQUESTS FOR  
PRODUCTION AND REQUESTS FOR ADMISSIONS" - PAGE 3

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division

STEVEN J. SCHUSTER, ISB # 3453  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
PO Box 83720  
Boise, ID 83720-0010  
Tele: (208) 334-4120  
FAX: (208) 854-8072

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

---

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Counterclaim Defendants.

---

Case No. CV 2015-1075

STATE OF IDAHO'S FIRST  
INTERROGATORIES,  
REQUESTS FOR  
PRODUCTION AND  
REQUESTS FOR  
ADMISSIONS

STATE OF IDAHO'S FIRST INTERROGATORIES, REQUESTS FOR PRODUCTION AND REQUESTS  
FOR ADMISSIONS - 1

EXHIBIT A

The State of Idaho, Idaho State Board of Land Commissioners, and the Idaho Department of Lands, by and through their attorney of record, Deputy Attorney General Steven J. Schuster, hereby submit this *State of Idaho's First Set of Interrogatories, Requests for Production and Requests for Admissions* to Philip Hudson.

### **INTRODUCTION**

This document contains the State of Idaho's first set of interrogatories and requests for production and admissions to the Philip Hudson. These interrogatories and requests are made pursuant to and are governed by the Idaho Rules of Civil Procedure.

### **GENERAL INSTRUCTIONS**

1. Unless otherwise indicated, these interrogatories and requests for production and admissions refer to all matters which are the subject of *State of Idaho et al., v. Philip Hudson*, Bonner County Case No. CV-2015-1075.

2. These interrogatories, requests for production and admissions are deemed continuing in nature, and your responses are to be supplemented as additional information and knowledge becomes available or known to you as provided in Rule 26(e) of the Idaho Rules of Civil Procedure.

3. In answering these interrogatories, requests for production and admissions, furnish all information which is known or available to you, including, but not limited to, information known of your personal knowledge, information obtainable by the diligent search of sources of information available to you, and all information in the possession of or available to any person or persons acting on your behalf or under your control or under the control of any of your attorneys, agents, employees, experts, insurers, independent contractors, investigators,

representatives, or others with whom you have a relationship and from whom you are capable of deriving information, documents or material.

4. Any reference herein to an individual, partnership, corporation, or other entity, shall include the present and past agents, employees, representatives, and assigns of that individual or entity.

5. If you withhold any information, in whole or in part, which is called for in an interrogatory or request for production, on the grounds that it is subject to attorney-client privilege or other privilege, identify each person or entity having knowledge of the basis for each claim or privilege or other objection.

6. If you withhold any document from production on the ground that it is subject to attorney-client privilege or other privilege, please identify such document by identifying the document's location, author, recipient, date and subject matter, as well as identifying the specific grounds for withholding the documents from disclosure.

7. If, for reasons other than alleged privilege, you do not provide a complete response to any interrogatory or request for production, state with respect to such interrogatory or request for production that a complete response is not provided and state the reason for the incomplete response.

8. Serve the original written answers to these interrogatories and responses to the requests for production with a copy of the notice of service on the State of Idaho.

#### **INSTRUCTIONS FOR INTERROGATORIES**

Please provide answers to these interrogatories within thirty (30) days of service by fully setting forth each interrogatory followed by an answer or objection to each interrogatory under oath in accordance with I.R.C.P. 33.

## **INSTRUCTIONS FOR REQUEST FOR PRODUCTION**

1. Please provide a written response within thirty (30) days of service by stating, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event any reasons for objection shall be stated pursuant to I.R.C.P. 34(b). The documents and things for inspection and copying shall be produced at the Office of the Idaho Attorney General, 700 W. State Street – Second Floor, P.O. Box 83720, Boise, ID 83720-0010, within thirty (30) days of service, or at such other time and place as may be mutually agreed upon by the parties. Inspection and copying will be conducted by the undersigned attorney or their agents and will continue from time to time from day to day until completed.

2. If you will make the originals of the requested documents available at a subsequent time requested by the State of Idaho, upon reasonable notice, then the requests for production may be satisfied by mailing true, correct, and legible copies of each and every requested document to Steven J. Schuster, Deputy Attorney General, Idaho Department of Lands, Office of the Idaho Attorney General, 700 W. State Street – Second Floor, P.O. Box 83720, Boise, ID 83720-0010, within the prescribed time.

## **INSTRUCTIONS FOR REQUESTS FOR ADMISSIONS**

1. In answering Requests for Admissions, furnish all information which is known or available to you, including, but not limited to, information known of your personal knowledge, information obtainable by diligent search of sources of information available to you, and all information in the possession of or available to any person or persons acting on your behalf or under your control or under the control of any of your attorneys, agents, employees, experts,



insurers, independent contractors, investigators, representatives, or others with whom you have a relationship and from whom you are capable of deriving information, documents or material.

2. If you withhold any information, in whole or in part, which is called for in a request for information, please state with respect to such request that a complete response is not provided and state the reason for the incomplete response.

3. You are requested to provide a response within thirty (30) days of service in accordance with I.R.C.P. 36.

### **DEFINITIONS**

In answering these interrogatories and requests of production, all terms used retain their normal meaning. The following terms, in addition to their commonly understood definitions, shall have the following meanings:

A. The term “**document**” shall be defined in the broadest possible manner and shall, at a minimum, mean any original or copy of words or information, whether produced in original or copy form by printing, typing, recording, retrieval from electronic storage, manual reproduction, or other process regardless of the form. The term “document” includes, but is not limited to, writings, papers, agreements, cards, communications, contracts, correspondence, electronic mail messages, facsimile transmissions, reports, telegrams, cables, wires, ledgers, bills statements, invoices, receipts, memoranda, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, accounting books, diaries, records, maps, charts, plans, drawings, sketches, blueprints, surveys, photographs, graphs, notes, tapes, personal calendars, summaries or records of meetings or conferences, summaries or reports of investigations or negotiations, opinions or reports of consultants, drafts of any documents, phonograph records, computer programs, printouts from electronic storage or other data

compilations from which information can be obtained or translated, if necessary, by the respondent through detection devices into reasonably usable form, marginal comments appearing on any document and all other written material of any nature whatsoever and any form of communication or representation, including letters, words, pictures, sounds or symbols or combination thereof.

**B. The term “identify” means:**

(1) As to documents: give the date of each such document, the addresser’s name, position, and addresses, the addressee’s name, position, and address, any file, index or other identification number, title and general character of the document, and specify the name, address and position of the person or persons having custody and control thereof. Alternatively, the document may be appended to your answer.

(2) As to a person or entity: give the full name, business address and telephone number, home address and telephone number, the person’s current employment, position and duties, and the person’s or entity’s relationship to you.

(3) As to conversations, including telephone communications, or meetings, give:

- a. the date, place and time such communication occurred;
- b. the identity of each and every person between whom the communication was transmitted, who was present or who participated in the conversation, and any other person(s) who have knowledge of such communication;
- c. the place at which such communication occurred, or in the case of telephone conversations, the location of each party; and

d. a detailed statement of the substance of what was discussed or what actions were taken.

C. The term “**communication**” means the transfer or conveyance or making known of any information in any manner or by any means and includes, but is not limited to, a written communication of every kind, a verbal conversation or personal meeting, and a telephone conversation.

D. The term “**you**” or “**your**” refers collectively to Philip Hudson.

E. The term “**rely**” when used in a request for all documents refers not only to documents containing information supporting the defenses in this matter, but also all documents reviewed, obtained, or prepared by Philip Hudson or their employees, agents or contractors, whether or not the information in those documents ultimately supports the position held or adopted by Philip Hudson.

f. The term “**fill**,” or “**Hudson fill**” refers to the material located adjacent to the Hudson property on Priest Lake as approximately identified by a yellow line on the accompanying Exhibits A and B, March 26, 2015, photographs of the area in question, as described in the State’s *Verified Complaint*, ¶ 12.

## **INTERROGATORIES**

**INTERROGATORY NO. 1:** Please identify each person who assisted or participated in answering these discovery requests.

**INTERROGATORY NO. 2:** Please state the name, address and telephone number of each and every person known to you or your attorneys who has any knowledge of the facts alleged in your *Answer and Counterclaim*.



**INTERROGATORY NO. 3:** Please state the name, address and telephone number of all witnesses whom you will call or may call to give testimony at the trial on this matter, the substance of the anticipated testimony and the relevant facts which you understand to be within the knowledge of such witness.

**INTERROGATORY NO. 4:** Please describe and identify all experts whom you will call or may call to give testimony at the trial of this matter, including all information discoverable pursuant to I.R.C.P. 26(b)(4)(A)(1).

**INTERROGATORY NO. 5:** Please identify in full and complete detail each and every document, writing or other physical evidence which you intend to offer as an exhibit in the trial of this matter.

**INTERROGATORY NO.6:** Please identify all facts you rely upon for your statement in ¶ 33 of your Answer and Counterclaim that the State's claim in this matter relate to property and activities above the ordinary high water mark of Priest Lake as it existed on July 3, 1890.

**INTERROGATORY NO.7:** What do you assert is the natural or ordinary high water mark of Priest Lake as of July 3, 1890?

**INTERROGATORY NO.8:** Please identify all facts you rely upon for your statement in ¶ 34 of your Answer and Counterclaim that the ordinary high water mark of Priest Lake as of July 3, 1890, uninfluenced by manmade activities and/or dams, is located at an elevation below the furthest waterward extension of any encroachments on the Defendant's property.

**INTERROGATORY NO. 9:** Please identify all facts you rely upon for your statement in ¶ 35 of your Answer and Counterclaim that the ordinary high water mark of Priest Lake as of July 3, 1890, uninfluenced by manmade activities and/or dams, is located at an elevation below the furthest waterward extension of any encroachments on the Hudson property.

**INTERROGATORY NO. 10:** When did the Defendant place the fill? Please identify the year and month, or range of dates.

**INTERROGATORY NO. 11:** Please identify what kind of material the Defendant Philip Hudson used to construct the fill.

**INTERROGATORY NO. 12:** Why was the fill put into place?

**INTERROGATORY NO. 13:** Please describe how this fill was constructed. As part of this response, please identify what kind of equipment was used, if any, to construct this fill.

**INTERROGATORY NO. 14:** Who was hired to construct the fill and the rock wall adjacent to it?

**INTERROGATORY NO. 15:** How much did it cost to construct the fill?

**INTERROGATORY NO. 16:** Where did the fill and rock wall materials come from?

**INTERROGATORY NO. 17:** How were the materials of which the fill is comprised transported to this site?

**INTERROGATORY NO. 18:** When did Philip Hudson acquire the property described in ¶ 1 of your Counterclaim?

#### **REQUESTS FOR PRODUCTION OF DOCUMENTS**

**REQUEST FOR PRODUCTION NO. 1:** Please produce all documents identified, used, or relied upon in responding to the interrogatories above.

**REQUEST FOR PRODUCTION NO. 2:** Please produce the curriculum vitae or resume for each and every expert consulted or retained by you in reference to this action.

**REQUEST FOR PRODUCTION NO. 3:** Please produce copies of all documents relied upon by any witness expected to be called at trial as an expert.

**REQUEST FOR PRODUCTION NO. 4:** Please produce any and all expert reports that were prepared for you concerning the matters set forth in your *Answer and Counterclaim* or otherwise related to your claims in this litigation.

**REQUEST FOR PRODUCTION NO. 5:** Please produce copies of all exhibits which you intend to offer or use at trial.

**REQUEST FOR PRODUCTION NO. 6:** Please produce all photographs and videos in your possession that you intend to offer as evidence or use at trial for illustrative purposes.

**REQUEST FOR PRODUCTION NO. 7:** Please produce all evidence of any kind that shows the natural or ordinary high water mark of Priest Lake on July 3, 1890, was at an elevation lower than 2437.64 feet above mean sea level, datum of 1929, supplementary adjustment of 1947.

**REQUEST FOR PRODUCTION NO. 8:** Please produce copies of all witness statements which relate in any way to the issues in this case.

**REQUEST FOR PRODUCTION NO. 9:** Please produce any and all documents that show that the Defendant Philip Hudson has paid taxes on any land below elevation 2437.64 feet above mean sea level, datum of 1929, supplementary adjustment of 1947, adjacent to his property on Priest Lake as described in ¶ 1 of your Counterclaim, specifically including the fill.

**REQUEST FOR PRODUCTION NO. 10:** Please provide any and all survey information, or other documentation, regarding the location of the property lines and lot corners that front Priest Lake for the property described in ¶ 1 of your Counterclaim.

**REQUEST FOR PRODUCTION NO. 11:** Please produce a copy of the deed by which you acquired your interest in the property described in ¶ 1 of your Counterclaim.



**REQUEST FOR PRODUCTION NO. 12:** Please provide a copy of any special covenants or other land use restrictions that run with the property described in ¶ 1 of your Counterclaim.

**REQUEST FOR PRODUCTION NO. 13:** Please provide a copy of the bylaws of any landowner association you may be a member of as a result of owning the property described in ¶ 1 of your Counterclaim.


**REQUEST FOR PRODUCTION NO. 14:** Please provide a copy of any mortgage agreement for the property described in ¶ 1 of your Counterclaim.

#### **REQUESTS FOR ADMISSIONS**

**REQUEST FOR ADMISSION NO. 1:** Admit that the Defendant Philip Hudson, or some party working under his direction, placed fill material consisting of rock, dirt, and concrete below elevation 2437.64 feet above mean sea level, datum of 1929, supplementary adjustment of 1947, adjacent to the property identified in ¶ 1 of your Counterclaim, after December 31, 1974.

**INTERROGATORY NO. 19:** If your response to Request for Admission No. 1 is anything other than an unqualified admission, please state each and every fact and opinion which supports your response, identify each and every witness who has knowledge that supports your answer and identify each document that supports your answer.

DATED this 26th day of October, 2015.

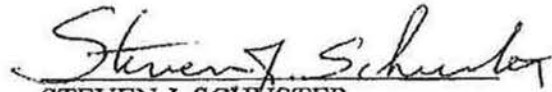
  
STEVEN J. SCHUSTER  
Deputy Attorney General  
Idaho Department of Lands

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of October 2015, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

JOHN MAGNUNSON  
1250 NORTHWOOD CENTER CT STE A  
COEUR D'ALENE ID 83816

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: (208) 667-0500
- ☒ E-Mail: [john@magnusononline.com](mailto:john@magnusononline.com)

  
STEVEN J. SCHUSTER  
Deputy Attorney General  
Idaho Department of Lands

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

2016 JAN 13 P 3:24

CLERK DISTRICT COURT

DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

STATE OF IDAHO, IDAHO STATE )  
BOARD OF LAND COMMISSIONERS )  
and IDAHO DEPARTMENT OF LANDS, )

Plaintiffs, )

-vs- )

PHILIP HUDSON, )

Defendant. )

\_\_\_\_\_  
PHILIP HUDSON, )

Counterclaim Plaintiff, )

-vs- )

STATE OF IDAHO, IDAHO STATE )  
BOARD OF LAND COMMISSIONERS )  
and IDAHO DEPARTMENT OF LANDS, )

Counterclaim Defendants. )  
\_\_\_\_\_

CASE NO: CV-2015-0001075

**ORDER SETTING TRIAL  
AND PRETRIAL ORDER**

(1) **TRIAL DATE.** This matter is set for **COURT TRIAL** on the **26<sup>th</sup> day of September, 2016,**

**AT THE HOUR OF 9:00 A.M.,** at the Bonner County Courthouse, Sandpoint, Idaho.

- (2) **PRE-TRIAL CONFERENCE.** This matter is set for **PRETRIAL CONFERENCE on the 19<sup>th</sup> day of August, 2016, AT THE HOUR OF 2:00 P.M.,** at the Bonner County Courthouse, Sandpoint, Idaho. The participants should be prepared to address all the subjects set forth in I.R.C.P. 16(b)(1) and (2).
- (3) **CONTINUANCES.** The trial date will be continued only under extraordinary circumstances, not with in the control of the parties and not foreseeable. Continuances will not be granted solely because all parties stipulate to a continuance. Any motion or stipulation to continue shall clearly state the reasons for the requested continuance and shall include an acknowledgment and agreement signed by each party certifying that the Motion to Continue as been discussed with and agreed to by each party. All deadlines listed below shall apply to the trial setting first listed above.
- (4) **MOTIONS TO ADD NEW PARTIES OR AMEND PLEADINGS** shall be filed no later than 60 days after the date of this Order.
- (5) **DISCOVERY** must be served and completely responded to at least 60 days prior to trial. This includes supplementation of discovery responses required by I.R.C.P. 26(e), unless good cause is shown for late supplementation. Discovery requests must be responded to in a timely way as required by the I.R.C.P. The deadlines contained in this Order cannot be used as a basis or reason for failing to timely respond to or supplement properly served discovery, including requests for disclosure of witnesses and/or trial exhibits.
- (6) **DISCOVERY DISPUTES** will not be heard by the Court without the written certification required by I.R.C.P. 37(a) (2). Discovery motions shall not refer the Court to other documents in the file. For example, if the sufficiency of an answer to an interrogatory is in issue, the motion shall contain, verbatim, both the interrogatory and the allegedly insufficient answer.
- (7) **WITNESS DISCLOSURE.** Except as previously disclosed in responses to discovery

requests, Plaintiff shall disclose all fact and expert witnesses no later than 120 days before trial. Defendants shall disclose their fact and expert witnesses no later than 90 days before trial. Rebuttal witnesses shall be disclosed no later than 60 days before trial. Expert witnesses shall be disclosed in the manner and with the specificity required by I.R.C.P. 26(b)(4)(A)(i). Any objection to the I.R.C.P. 26(b)(4)(A)(i) expert witness disclosure must be filed within 45 days of the disclosure or is deemed waived. Witnesses not disclosed in responses to discovery and/or as required herein will be excluded at trial, unless allowed by the Court in the interest of justice.

(8) **MOTIONS. DISPOSITIVE MOTIONS**, and responses thereto, shall comply in all respects with I.R.C.P. 56 and be filed no later than 90 days before trial. **ALL OTHER MOTIONS**, including any Motion in Limine, shall be filed and heard by the Court no later than 30 days before trial. The original of all Motions and supporting submissions shall be filed with the clerk of the court. **However, one (1) duplicate Judge's Copy of all Motions, and any opposition thereto, together with supporting memorandum, affidavits and documents, shall be submitted directly to the Court's chambers in Bonner County. All the duplicate copies must be stamped "Judge's Copy" to avoid confusion with the original pleading.** All other pleadings, notices, etc., should be filed with the Clerk without copies to the Court's chambers.

(9) **STIPULATED MODIFICATIONS**. The parties may stipulate to the modification of the discovery, witness disclosure and motion deadlines stated herein **only** upon submission of a stipulation to the Court and a Court Order modifying the deadlines. No order modifying deadlines will be granted if it would result in a delay in the trial date, without a formal motion to vacate the trial, and good cause shown.

(10) **TRIAL BRIEFS**. Trial briefs are encouraged but not required. If submitted, trial briefs



should address substantive factual, legal and/or evidentiary issues the parties believe are likely to arise during the trial, with appropriate citation to authority. Any trial brief should be exchanged between the parties and submitted to the clerk of the court, and a duplicate Judge's Copy shall be submitted to the Court's chambers in Bonner County, no later than 7 days prior to trial.

(11) **PRE-MARKED EXHIBITS, AND AN EXHIBIT LIST** shall be exchanged between the parties and filed with the Court no later than 14 days prior to trial. Each party shall also lodge with the Court at chambers, a duplicate completed exhibit list plus one complete, duplicate marked set of that party's proposed exhibits for the Court's use during the trial. Unless otherwise ordered, Plaintiff shall identify exhibits beginning with the number "1" and the Defendant shall identify exhibits beginning with the letter "A." The Court will provide a template for the Exhibit List upon request.

(12) **WITNESS LISTS.** Witness lists shall be prepared and exchanged between parties and filed with the Clerk no later than 14 days prior to trial. Each party shall provide opposing parties with a list of the party's witnesses and shall provide the Court with two copies of each list of witnesses. Witnesses should be listed in the order they are anticipated to be called.

(13) **JURY INSTRUCTIONS.** Proposed jury instructions and verdict forms requested by any party shall be prepared in conformity with I.R.C.P. 51(a), except that they shall be filed with the Court and exchanged between the parties at least 7 days prior to trial. Except for good cause shown, proposed jury instructions should conform to the pattern Idaho Jury Instructions (IDJI) approved by the Idaho Supreme Court. In addition to submitting written proposed instructions that comply with Rule 51(a), the parties shall also submit both a clean version and a version with cited authority to the Court's Chambers, in Word format, at least 7 days prior to trial. Certain "stock" instructions need not be submitted. These will typically include IDJI



1.00, 1.01, 1.03, 1.03.1, 1.05, 1.09, 1.11, 1.13/1.13.1, 1.15.1, 1.17, 1.20.1, and 1.24.1. It is requested that the parties agree on the basic instruction giving the jury a short, plain statement of the claims, per IDJI 1.07.

**(14) MEDIATION.** Pursuant to I.R.C.P. 16(k)(4), **the parties are ORDERED to mediate this matter, and the mediation shall comply with I.R.C.P. 16(k).** Mediation must be held no later than 45 days prior to trial.

**(15) TRIAL PROCEDURES.** A total of 5 trial days have been reserved for this trial. Because more than one case is set to begin on the designated trial date, upon completion of one trial another trial may begin. Due to this possibility, counsel, clients, and witnesses will need to be available during the entire week the trial is set. If the parties believe that more trial days will be required, the parties are ORDERED to notify the Court of this request no less than 60 days prior to trial. **On the first day of trial, counsel shall report to the Court's chambers at 8:30 a.m. for a brief status conference.** Unless otherwise ordered, or as modified during trial as necessary, trial days will begin at 9:00 a.m. and close at or about 5:00 p.m., with a one hour break for lunch.

**(16) HEARINGS OR CONFERENCES WITH THE COURT.** All meetings, conferences, and/or hearings with the Court shall be scheduled in advance with the Court's Secretary by calling 208-265-1445. No hearing shall be noticed without contacting the Secretary.

**(17) ALTERNATE JUDGES.** Notice is hereby given, pursuant to I.R.C.P. 40(d)(1)(G), that an alternate judge may be assigned to preside over the trial of this case, if the current presiding judge is unavailable. The list of potential alternate judges is: Charles W. Hosack, John P. Luster, John T. Mitchell, Fred M. Gibler, Lansing Haynes, Rich Christensen, George Reinhardt, III, Benjamin Simpson, Jeff Brudie, Carl Kerrick, John Stegner, Cynthia K.C. Meyer, Jay Gaskill, Gregory FitzMaurice, and Steve Verby. If the I.R.C.P. 40(d)(1)

disqualification has not previously been exercised, failure to disqualify, without cause, any one of these alternate judges within ten (10) days of the date of this Order shall constitute a waiver of such right.

DATED this 13<sup>th</sup> day of January, 2016.

A handwritten signature in black ink, appearing to read "Barbara Buchanan", is written above a horizontal line.

BARBARA BUCHANAN  
District Judge

## CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Order Setting Trial and Pretrial Order was served upon each of the following individuals in the manner indicated this 13 day of January, 2016.

Steven J. Schuster  
Attorney at Law  
PO Box 83720  
Boise ID 83720

Mailed X Hand Delivered \_\_\_\_\_ Faxed \_\_\_\_\_

John F. Magnuson  
Attorney at Law  
PO Box 2350  
Coeur d'Alene ID 83816-2350

Mailed X Hand Delivered \_\_\_\_\_ Faxed \_\_\_\_\_

Michael W. Rosedale  
Clerk Of The District Court

By:   
Deputy Clerk

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division

STEVEN J. SCHUSTER, ISB # 3453  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
PO Box 83720  
Boise, ID 83720-0010  
Tele: (208) 334-4120  
FAX: (208) 854-8072

FILED STATE OF IDAHO  
CLERK  
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE BOARD OF LAND )  
COMMISSIONERS and IDAHO DEPARTMENT OF )  
LANDS, )

Plaintiffs, )

vs. )

PHILIP HUDSON, )

Defendant. )

PHILIP HUDSON, )

Counterclaim Plaintiff, )

vs. )

STATE OF IDAHO, IDAHO STATE BOARD OF LAND )  
COMMISSIONERS and IDAHO DEPARTMENT OF )  
LANDS, )

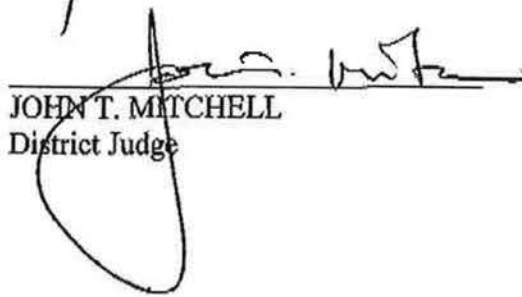
Counterclaim Defendants. )

Case No. CV 2015-1075

**ORDER ON MOTION TO  
DISQUALIFY**

Pursuant to Plaintiffs State of Idaho, Idaho State Board of Land Commissioners and Idaho Department of Lands' *Motion to Disqualify*, IT IS HEREBY ORDERED that the Honorable John T. Mitchell, District Judge, is disqualified as Judge in the above-entitled action.

DATED this 1<sup>st</sup> day of February, 2016.

  
JOHN T. MITCHELL  
District Judge

**CERTIFICATE OF SERVICE**

I hereby certify that on this 2 day of February, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

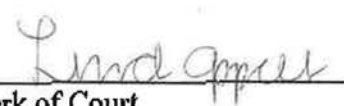
JOHN MAGNUNSON  
1250 NORTHWOOD CENTER CT STE A  
COEUR D'ALENE ID 83816

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (208) 667-0500
- ☐ E-Mail:

STEVEN J SCHUSTER  
OFFICE OF ATTORNEY GENERAL  
IDAHO DEPARTMENT OF LANDS  
PO BOX 83720  
BOISE ID 83720-0010

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (208) 854-8072
- ☐ E-Mail:

(cc Judge Haynes,  
(e-mailed Suzi))

  
Clerk of Court

JOHN F. MAGNUSON  
 Attorney at Law  
 P.O. Box 2350  
 1250 Northwood Center Court, Suite A  
 Coeur d'Alene, ID 83814  
 Phone: (208) 667-0100  
 Fax: (208) 667-0500  
 ISB #04270

Attorney for Defendant/Counterclaim  
 Plaintiff Philip Hudson

STATE OF IDAHO  
 County of Bonner  
 FILED APR 7, 2016  
 AT 2:07 O'CLOCK P.M.  
 CLERK, DISTRICT COURT  
 Deputy [Signature]

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE  
 BOARD OF LAND COMMISSIONERS  
 and IDAHO DEPARTMENT OF LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

\_\_\_\_\_  
 PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE  
 BOARD OF LAND COMMISSIONERS  
 and IDAHO DEPARTMENT OF LANDS,

Counterclaim Defendants.

NO. CV-15-1075

**DEPOSITION SUBPOENA DUCES  
 TECUM AND NOTICE OF  
 DEPOSITION: IDAHO  
 DEPARTMENT OF WATER  
 RESOURCES**

DEPOSITION SUBPOENA DUCES TECUM AND NOTICE OF DEPOSITION:  
 IDAHO DEPARTMENT OF WATER RESOURCES - PAGE 1



## THE STATE OF IDAHO TO: THE IDAHO DEPARTMENT OF WATER RESOURCES


PURSUANT TO IRCP 30(b)(6), Idaho Department of Water Resources, is required to designate one or more persons with reasonable and particular knowledge to appear and to testify as to the matters on which testimony is to be taken as set forth in Exhibit A hereto, and to appear and produce the documents requested by this Subpoena Duces Tecum as set forth on Exhibit A for inspection and copying at the offices of John F. Magnuson, 1250 Northwood Center Court, Suite A, Coeur d'Alene, Idaho on the 4<sup>th</sup> day of May, 2016, at 9:00 a.m. Testimony will be taken before an official court reporter and notary public, commencing at the hour of 9:00 a.m., and if not completed on that day, the taking of the same will be continued thereafter from day to day and from time to time until fully taken.

Command is further made pursuant to IRCP 45 to then and there produce the documents requested on Exhibit A hereto.

You are further notified that if you fail to appear at the place and time specified above, that you may be held in contempt of court and that the aggrieved party may recover from you the sum of \$100 and all damages which the party may sustain by your failure to attend as a witness.

DATED this 7<sup>th</sup> day of April, 2016.

BY ORDER OF THE COURT.

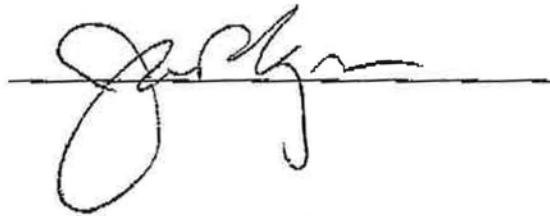
  
JOHN F. MAGNUSON, ISB #04270  
Attorney for Defendant/Counterclaim  
Plaintiff Philip Hudson  
as an Officer of the Court Pursuant to IRCP 45(a)

CERTIFICATE OF SERVICE

I hereby certify that on this 7<sup>th</sup> day of April, 2016, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Angela Schaer Kaufmann  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
P.O. Box 83720  
Boise, ID 83720

X U.S. MAIL  
       E-MAIL TRANSMISSION  
       HAND DELIVERED  
       OVERNIGHT MAIL  
X FACSIMILE - 208\854-8072



**EXHIBIT A TO SUBPOENA DUCES TECUM AND  
DEPOSITION SUBPOENA TO  
IDAHO DEPARTMENT OF WATER RESOURCES**

**1. DOCUMENTS TO BE PRODUCED**

The documents to be produced at deposition, pursuant to IRCP 45, shall include the following:

- (A) All hydrographs showing, documenting, or memorializing observations and/or measurements of the elevation of the water level of Priest Lake from July 3, 1890 through the present;
- (B) All charts, graphs, or summaries containing measurements of the elevation of the water level of Priest Lake during any portion or all of the period from July 3, 1890 to the present;
- (C) All internal memoranda or communications by and between IDWR and/or any other federal or state agency in which the subject of the effect (if any) of the construction and/or operation of the Priest Lake dam on the ordinary high water mark of Priest Lake is discussed;
- (D) All internal memoranda or communications by and between IDWR and/or any private or public utility (including but not limited to Avista Utilities and its predecessor (Washington Water Power Company)) in which the subject of the effect (if any) of the construction and/or operation of the Priest Lake dam on the ordinary high water mark of Priest Lake is discussed;
- (E) All documents showing or discussing the presence or absence of terrestrial vegetation, along any portion of the shoreline of Priest Lake, at an elevation lower than 2437.64 feet above mean sea level, datum of 1929, supplementary adjustment of 1947;
- (F) All correspondence by or between IDWR, on the one hand, and the Idaho Department of Lands (or any agent acting by or on behalf of the Idaho Department of Lands), on the other hand, which discusses the impact (if any) of the construction and/or operation of the Priest Lake dam on the ordinary high water mark of Priest Lake.

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

2016 APR 18 P 4:01

CLERK DISTRICT COURT  
*[Signature]*  
DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

STATE OF IDAHO, IDAHO STATE )  
BOARD OF LAND COMMISSIONERS )  
and IDAHO DEPARTMENT OF LANDS, )

Plaintiff, )

-vs- )

PHILIP HUDSON, )

Defendants. )

---

PHILIP HUDSON, )

Counterclaim Plaintiff, )

-vs- )

STATE OF IDAHO, IDAHO STATE )  
BOARD OF LAND COMMISSIONERS )  
and IDAHO DEPARTMENT OF LANDS, )

Counterclaim Defendants. )

**CASE NO: CV-2015-0001075**

**ORDER SETTING TRIAL  
AND PRETRIAL ORDER**

- (1) **TRIAL DATE.** This matter is set for **COURT TRIAL** on the **29<sup>th</sup> day of November, 2016,**  
**AT THE HOUR OF 9:00 A.M.,** at the Bonner County Courthouse, Sandpoint, Idaho.

- (2) **PRE-TRIAL CONFERENCE.** This matter is set for **PRETRIAL CONFERENCE on the 21<sup>st</sup> day of October, 2016, AT THE HOUR OF 1:45 P.M.,** at the Bonner County Courthouse, Sandpoint, Idaho. The participants should be prepared to address all the subjects set forth in I.R.C.P. 16(b)(1) and (2).
- (3) **CONTINUANCES.** The trial date will be continued only under extraordinary circumstances, not with in the control of the parties and not foreseeable. Continuances will not be granted solely because all parties stipulate to a continuance. Any motion or stipulation to continue shall clearly state the reasons for the requested continuance and shall include an acknowledgment and agreement signed by each party certifying that the Motion to Continue as been discussed with and agreed to by each party. All deadlines listed below shall apply to the trial setting first listed above.
- (4) **MOTIONS TO ADD NEW PARTIES OR AMEND PLEADINGS** shall be filed no later than 60 days after the date of this Order.
- (5) **DISCOVERY** must be served and completely responded to at least 60 days prior to trial. This includes supplementation of discovery responses required by I.R.C.P. 26(e), unless good cause is shown for late supplementation. Discovery requests must be responded to in a timely way as required by the I.R.C.P. The deadlines contained in this Order cannot be used as a basis or reason for failing to timely respond to or supplement properly served discovery, including requests for disclosure of witnesses and/or trial exhibits.
- (6) **DISCOVERY DISPUTES** will not be heard by the Court without the written certification required by I.R.C.P. 37(a) (2). Discovery motions shall not refer the Court to other documents in the file. For example, if the sufficiency of an answer to an interrogatory is in issue, the motion shall contain, verbatim, both the interrogatory and the allegedly insufficient answer.
- (7) **WITNESS DISCLOSURE.** Except as previously disclosed in responses to discovery



requests, Plaintiff shall disclose all fact and expert witnesses no later than 120 days before trial. Defendants shall disclose their fact and expert witnesses no later than 90 days before trial. Rebuttal witnesses shall be disclosed no later than 60 days before trial. Expert witnesses shall be disclosed in the manner and with the specificity required by I.R.C.P. 26(b)(4)(A)(i). Any objection to the I.R.C.P. 26(b)(4)(A)(i) expert witness disclosure must be filed within 45 days of the disclosure or is deemed waived. Witnesses not disclosed in responses to discovery and/or as required herein will be excluded at trial, unless allowed by the Court in the interest of justice.

- (8) **MOTIONS.** **DISPOSITIVE MOTIONS**, and responses thereto, shall comply in all respects with I.R.C.P. 56 and be filed no later than 90 days before trial. **ALL OTHER MOTIONS**, including any Motion in Limine, shall be filed and heard by the Court no later than 30 days before trial. The original of all Motions and supporting submissions shall be filed with the clerk of the court. **However, one (1) duplicate Judge's Copy of all Motions, and any opposition thereto, together with supporting memorandum, affidavits and documents, shall be submitted directly to the Court's chambers in Bonner County. All the duplicate copies must be stamped "Judge's Copy" to avoid confusion with the original pleading.** All other pleadings, notices, etc., should be filed with the Clerk without copies to the Court's chambers.
- (9) **STIPULATED MODIFICATIONS.** The parties may stipulate to the modification of the discovery, witness disclosure and motion deadlines stated herein **only** upon submission of a stipulation to the Court and a Court Order modifying the deadlines. No order modifying deadlines will be granted if it would result in a delay in the trial date, without a formal motion to vacate the trial, and good cause shown.
- (10) **TRIAL BRIEFS.** Trial briefs are encouraged but not required. If submitted, trial briefs



should address substantive factual, legal and/or evidentiary issues the parties believe are likely to arise during the trial, with appropriate citation to authority. Any trial brief should be exchanged between the parties and submitted to the clerk of the court, and a duplicate Judge's Copy shall be submitted to the Court's chambers in Bonner County, no later than 7 days prior to trial.

(11) **PRE-MARKED EXHIBITS, AND AN EXHIBIT LIST** shall be exchanged between the parties and filed with the Court no later than 14 days prior to trial. Each party shall also lodge with the Court at chambers, a duplicate completed exhibit list plus one complete, duplicate marked set of that party's proposed exhibits for the Court's use during the trial. Unless otherwise ordered, Plaintiff shall identify exhibits beginning with the number "1" and the Defendant shall identify exhibits beginning with the letter "A." The Court will provide a template for the Exhibit List upon request.

(12) **WITNESS LISTS.** Witness lists shall be prepared and exchanged between parties and filed with the Clerk no later than 14 days prior to trial. Each party shall provide opposing parties with a list of the party's witnesses and shall provide the Court with two copies of each list of witnesses. Witnesses should be listed in the order they are anticipated to be called.

(13) **JURY INSTRUCTIONS.** Proposed jury instructions and verdict forms requested by any party shall be prepared in conformity with I.R.C.P. 51(a), except that they shall be filed with the Court and exchanged between the parties at least 7 days prior to trial. Except for good cause shown, proposed jury instructions should conform to the pattern Idaho Jury Instructions (IDJI) approved by the Idaho Supreme Court. In addition to submitting written proposed instructions that comply with Rule 51(a), the parties shall also submit both a clean version and a version with cited authority to the Court's Chambers, in Word format, at least 7 days prior to trial. Certain "stock" instructions need not be submitted. These will typically include IDJI

1.00, 1.01, 1.03, 1.03.1, 1.05, 1.09, 1.11, 1.13/1.13.1, 1.15.1, 1.17, 1.20.1, and 1.24.1. It is requested that the parties agree on the basic instruction giving the jury a short, plain statement of the claims, per IDJI 1.07.

**(14) MEDIATION.** Pursuant to I.R.C.P. 16(k)(4), **the parties are ORDERED to mediate this matter, and the mediation shall comply with I.R.C.P. 16(k).** Mediation must be held no later than 45 days prior to trial.

**(15) TRIAL PROCEDURES.** A total of 5 trial days have been reserved for this trial. Because more than one case is set to begin on the designated trial date, upon completion of one trial another trial may begin. Due to this possibility, counsel, clients, and witnesses will need to be available during the entire week the trial is set. If the parties believe that more trial days will be required, the parties are ORDERED to notify the Court of this request no less than 60 days prior to trial. **On the first day of trial, counsel shall report to the Court's chambers at 8:30 a.m. for a brief status conference.** Unless otherwise ordered, or as modified during trial as necessary, trial days will begin at 9:00 a.m. and close at or about 5:00 p.m., with a one hour break for lunch.

**(16) HEARINGS OR CONFERENCES WITH THE COURT.** All meetings, conferences, and/or hearings with the Court shall be scheduled in advance with the Court's Secretary by calling 208-265-1445. No hearing shall be noticed without contacting the Secretary.

**(17) ALTERNATE JUDGES.** Notice is hereby given, pursuant to I.R.C.P. 40(d)(1)(G), that an alternate judge may be assigned to preside over the trial of this case, if the current presiding judge is unavailable. The list of potential alternate judges is: Charles W. Hosack, John P. Luster, John T. Mitchell, Fred M. Gibler, Lansing Haynes, Rich Christensen, George Reinhardt, III, Benjamin Simpson, Jeff Brudie, Carl Kerrick, John Stegner, Cynthia K.C. Meyer, Jay Gaskill, Gregory FitzMaurice, and Steve Verby, Scott Wayman. If the I.R.C.P.

40(d)(1) disqualification has not previously been exercised, failure to disqualify, without cause, any one of these alternate judges within ten (10) days of the date of this Order shall constitute a waiver of such right.

DATED this 18<sup>th</sup> day of April, 2016.

A handwritten signature in black ink, appearing to read "Barbara Buchanan", written in a cursive style.

---

BARBARA BUCHANAN  
District Judge

### CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Order Setting Trial and Pretrial Order was served upon each of the following individuals in the manner indicated this 18<sup>th</sup> day of April, 2016.

Angela Schaer Kaufmann  
Attorney at Law  
PO Box 83720  
Boise ID 83720-0010

Mailed X Hand Delivered \_\_\_\_\_ Faxed \_\_\_\_\_

John F. Magnuson  
Attorney at Law  
Po Box 2350  
Coeur D'alene ID 83816-2350

Mailed X Hand Delivered \_\_\_\_\_ Faxed \_\_\_\_\_

Michael W. Rosedale  
Clerk Of The District Court

By: Sandra Pasor  
Deputy Clerk

ORIGINAL

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

STEVEN W. STRACK  
Deputy Attorney General  
Acting Chief, Natural Resources Division

ANGELA SCHAER KAUFMANN, ISB # 5436  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
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Boise, ID 83720-0010  
Tele: (208) 334-4120  
FAX: (208) 854-8072

STATE OF IDAHO  
COUNTY OF BONNER  
DISTRICT JUDICIAL DIST.

2015 APR 18 AM 11:21

CLERK DISTRICT COURT  
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE BOARD OF LAND )  
COMMISSIONERS and IDAHO DEPARTMENT OF )  
LANDS, )

Plaintiffs, )

vs. )

PHILIP HUDSON, )

Defendant. )

PHILIP HUDSON, )

Counterclaim Plaintiff, )

vs. )

STATE OF IDAHO, IDAHO STATE BOARD OF LAND )  
COMMISSIONERS and IDAHO DEPARTMENT OF )  
LANDS, )

Counterclaim Defendants. )

**Case No. CV 2015-1075**

**STATE OF IDAHO'S MOTION  
FOR PARTIAL JUDGMENT  
RE: STATE OF IDAHO'S  
FIRST CLAIM FOR RELIEF**

The State of Idaho, the Idaho State Board of Land Commissioners and the Idaho Department of Lands (“IDL”) (collectively referred to as “State,”) and pursuant to Idaho Rule of Civil Procedure 56, hereby move this Court for partial summary judgment. By the motion, the State seeks an order establishing as a matter of law that, pursuant to the Idaho Lake Protection Act, Idaho Code Title 58, Chapter 13, the State has regulatory authority over the fill that is the subject of this litigation, regardless of the location of the natural or ordinary high water mark of Priest Lake, because such fill is located on the bed of a navigable lake as defined by Idaho Code § 58-1302(b). The State further seeks an order granting the State the Relief Sought by the State of Idaho Under the First Claim for Relief as set forth in the Verified Complaint at pages 6-7:

1. A mandatory injunction from the court ordering Defendant to:
  - a. Remove all unauthorized fill below elevation 2437.64 feet msl during the low water period of Priest Lake (between November 1 and March 1);
  - b. Stabilize any unstable bank or lake bed remaining landward of elevation 2437.64 feet msl of Priest Lake; and
  - c. Perform any other measures recommended by IDL designed to contain sediment and erosion and to restore the lake to as near its condition immediately prior to the unauthorized encroachment as possible.
2. A permanent injunction, pursuant to Idaho Code § 58-1308, ordering Defendant to refrain from encroaching on, in or above the beds or waters of Priest Lake unless and until approval therefore is obtained from IDL as provided in the Lake Protection Act.



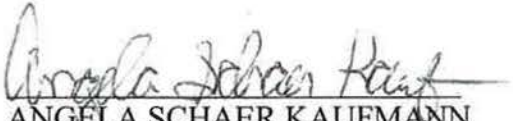
3. An order requiring Defendant to pay a civil penalty in the amount of ten thousand dollars (\$10,000) for violation of the LPA, Idaho Code §§ 58-1301 and -1302 and IDAPA 20.03.04.012.02

This motion is based upon the State's *Verified Complaint* and *Reply to Counterclaim*, both of which are on file with the court; and the *Affidavit of Mick Shanilec* with supporting exhibits, the *Affidavit of Matthew Anders* with supporting exhibits, and the State's *Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment*, filed concurrently herewith.

These documents establish that there are no issues of material fact, and that the State is entitled to partial summary judgment as a matter of law that the Idaho Lake Protection Act, Idaho Code title 58, chapter 13, authorizes the State to regulate all encroachments below the high water mark,<sup>1</sup> regardless of whether the high water mark of the lake is natural or artificial.

A hearing will be scheduled pending coordination with opposing counsel.

DATED this 14th day of April, 2016.

  
ANGELA SCHAER KAUFMANN  
Deputy Attorney General  
Idaho Department of Lands

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<sup>1</sup> As discussed more fully in the State's accompanying memorandum, IDL's discussion of an artificial high water mark on Priest Lake is done only for the purpose of the instant motion to establish IDL's regulatory authority regardless of title. As set forth in the State's pleadings, it denies that there is an artificial high water mark of Priest Lake, but that the scope of the State's regulatory authority in the case can be determined now as a matter of law without having to wait for the conclusion of litigation to determine the natural or ordinary high water mark.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of April 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

JOHN MAGNUNSON  
1250 NORTHWOOD CENTER CT STE A  
COEUR D'ALENE ID 83816

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: (208) 667-0500
- ☐ E-Mail:

  
ANGELA SCHAER KAUFMANN  
Deputy Attorney General  
Idaho Department of Lands

ORIGINAL

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

STEVEN W. STRACK  
Deputy Attorney General  
Acting Chief, Natural Resources Division

ANGELA SCHAER KAUFMANN, ISB # 5436  
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Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
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Tele: (208) 334-4120  
FAX: (208) 854-8072

STATE OF IDAHO  
COUNTY OF BONNER  
DISTRICT JUDICIAL DIST.

2015/22/18 A 11:21

CLERK DISTRICT COURT  
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Counterclaim Defendants.

Case No. CV 2015-1075

MEMORANDUM IN SUPPORT  
OF THE STATE OF IDAHO'S  
MOTION FOR SUMMARY  
JUDGMENT

The State of Idaho, Idaho State Board of Land Commissioners and the Idaho Department of Lands, (collectively, “State”), by and through their attorneys of record, hereby submit this *Memorandum in Support of the State of Idaho’s Motion for Summary Judgment*. In this case, there is no question of material fact. As a matter of law, the State has the legal authority and duty to regulate the unauthorized fill that is the subject of this litigation pursuant to Idaho Code title 58, chapter 13, the Idaho Lake Protection Act (“LPA”) because it is below the high water mark of Priest Lake, regardless of whether the high water mark of the lake is natural or artificial.<sup>1</sup> Therefore, summary judgment should be granted in favor of the State.

### **PROCEDURAL BACKGROUND**

To date, there has only been a *Verified Complaint* filed by the State, an *Answer and Counterclaim* filed by Hudson, and a *Reply to Counterclaim* filed by the State. The parties have served discovery requests on each other and each party has responded. There are no other pleadings in the case.

### **FACTUAL BACKGROUND**

Priest Lake is a navigable lake located in Bonner County, Idaho. Priest Lake was a navigable lake at the time Idaho was admitted to the Union on July 3, 1890, and continues to be navigable from that date to the present. State’s *Verified Complaint*, ¶ 6; Defendant’s *Answer and Counterclaim*, ¶ 6.

In 1950, the Idaho Legislature enacted Idaho Code title 70, chapter 5. This chapter authorized the construction of an outlet control structure on Priest River to “regulate the level of

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<sup>1</sup> IDL’s discussion of an artificial high water mark on Priest Lake is made only for the purpose of the instant motion to establish IDL’s regulatory authority regardless of title. As set forth in the State’s pleadings, the State specifically denies that there is an artificial high water mark of Priest Lake. As explained herein, however, the scope of the State’s regulatory authority in the case can be determined now as a matter of law without a determination of the natural or ordinary high water mark.

Priest Lake” at an elevation “which will preserve for the use of the people the beach, boating and other recreational facilities which are now located on said lake.” Idaho Code § 70-501. Idaho Code § 70-507 requires the Idaho Department of Water Resources (“IDWR”)<sup>2</sup> to manage Priest Lake’s elevation through the outlet control structure (“Outlet Dam”) at an elevation of 3.0 on the United States Geological Survey (“USGS”) outlet gage (“Outlet Gage”), with gage datum of 2434.64 feet above mean sea level (“msl”).<sup>3</sup> IDWR is required to maintain this 3.0 elevation on the Outlet Gage

from and after the time each year following the run-off of accumulated winter snows, when the surface level of the waters of Priest Lake has receded to such elevation, until the time after the close of the recreation season, . . . that said waters may be released and the surface level permitted to recede below said elevation 3.0.

Idaho Code § 70-507. The 3.0 elevation on the gage corresponds to 2437.64 feet msl.<sup>4</sup>

The State has obtained continuous, daily lake elevation data from the Outlet Gage to provide a hydrologic picture of Priest Lake. *Anders Affidavit*, ¶ 5-7 and Exhibit B.<sup>5</sup> Mr. Anders downloaded data from 1930 to 2015 and included it in his calculations. *Id.* Mr. Anders then prepared hydrographs based upon this data to illustrate the effect of the Outlet Dam on the elevation of the lake. *Anders Affidavit*, ¶ 14-19 and Exhibit E. As set forth in the *Anders Affidavit*, ¶ 19 and Exhibit E, IDWR has in fact managed the Outlet Dam and lake elevation at Priest Lake in accordance with Idaho Code § 70-507 since 1951, the first full year that the

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<sup>2</sup> The Idaho Department of Water Resources is referred to by its former name in Idaho Code § 70-507, the Department of Water Administration.

<sup>3</sup> The “gage datum” is an arbitrary number chosen when the gage is established. *Anders Affidavit*, ¶ 10, Exhibit D. Zero on the gage is typically chosen at or below normal low water so that all gage readings are small, positive values. *Id.* All lake level elevations stated herein refer to the elevation above mean sea level as established in the National Geodetic Vertical Datum (datum of 1929, supplementary adjustment of 1947).

<sup>4</sup> The Outlet Structure was constructed in 1950, and storage of water first occurred after August 8, 1950. *Affidavit of Matt Anders (“Anders Affidavit”),* ¶ 11, Exhibit C, Water Supply Paper 1516 (1957).

<sup>5</sup> Currently, all of that data is also available on-line from USGS at the websites indicated in paragraphs 6-7 of the Anders affidavit.



summer water elevation of the lake was regulated. This is the summer elevation of the lake that has been maintained since 1951. *Anders Affidavit*, ¶ 19.

The accompanying *Affidavit of Mick Schanilec* (“*Schanilec Affidavit*”), the Area Manager IDL’s Priest Lake Office, sets forth facts concerning the fill that is the focus of this litigation. In July 2014, IDL investigated a complaint about an unauthorized fill in Priest Lake adjacent to upland property owned by Hudson. *Schanilec Affidavit*, ¶ 7. The unauthorized fill is located below, or waterward, of elevation 2437.64 feet msl. *Id.*, ¶ 11. There are about fifty (50) cubic yards of fill below this elevation and in the waters of the lake. The fill consists of concrete, rock and dirt along about forty (40) feet of shoreline and twenty (20) to twenty-five (25) feet into the lake from elevation 2437.64 feet msl. *Id.*, ¶¶ 11 and 12. There is no navigational or public benefit for the fill, which is located adjacent to the Hudson property. *Id.*, ¶ 9.

IDL has attempted to have Hudson remove the fill, but he has declined. *Schanilec Affidavit*, ¶ 12. To date, the subject fill remains in Priest Lake as depicted in Exhibits B and C to the *Schanilec Affidavit*.

## ARGUMENT

### **I. Summary Judgment Is Appropriate When There Is No Issue Of Material Fact.**

Pursuant to I.R.C.P. 56(c), a District Court shall grant summary judgment “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” When a motion for summary judgment is supported by affidavits or depositions, “an adverse party may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” I.R.C.P. 56(e). A court must



liberally construe all disputed facts and draw all reasonable inferences and conclusions in favor of the non-moving party. *See, e.g., Edged In Stone, Inc. v. Northwest Power Systems, LLC*, 156 Idaho 176, 180, 321 P.3d 726, 730 (2014). If there are conflicting inferences in the record, or if reasonable minds might reach different conclusions from the evidence in the record, the motion must be denied. *Id.* If no disputed issue of material fact is present, however, summary judgment should be granted. *Id.*

The case at hand is an action by the State to determine the scope of and enforce the Idaho Lake Protection Act, Idaho Code title 58, chapter 13 (“LPA”), and to quiet title in a portion of Priest Lake. The case will be tried without a jury, which affects the standard for ruling on a summary judgment motion:

[W]hen an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant summary judgment despite the possibility of conflicting inferences.

*Bauchman-Kingston Partnership, LP v. Haroldsen*, 149 Idaho 87, 90, 233 P.3d 18, 21 (2008).

Summary judgment is appropriate because there is no question of material fact as to the State’s regulatory authority over the subject fill under the LPA.

## **II. The State Has Regulatory Authority Over The Hudson Fill Because It Is Located On The Bed Of Priest Lake.**

It is beyond dispute and “well established that the State owns in trust for the public title to the bed of navigable waters below the OHWM [ordinary high water mark] as it existed at the time the State was admitted into the Union.” *Erickson v. State*, 132 Idaho 208, 210, 970 P.2d 1, 3 (1998). The Idaho Legislature has designated the State Board of Land Commissioners as the entity to regulate the control and use or disposition of navigable lakes and rivers below the OHWM. Idaho Code § 58-104(9).

Additionally, the LPA designates the Board as the entity to regulate encroachment on Idaho's navigable lakes: "The board of land commissioners shall regulate, control and may permit encroachments in aid of navigation or not in aid of navigation on, in or above the beds or waters of navigable lakes as provided herein." Idaho Code § 58-1303. The "beds of navigable lakes" is defined as follows:

'Beds of navigable lakes' means the lands lying under or below the 'natural or ordinary high water mark' of a navigable lake and, for purposes of this act only, the lands lying between the natural or ordinary high water mark and the artificial high water mark, if there be one.

I.C. § 58-1302(b). In other words, the State's regulatory authority under the LPA extends not only to the lands owned by the State below the OHWM, but also to any lands lying below any AHWM<sup>6</sup> and above the OHWM.

As set forth in the *Anders Affidavit*, Priest Lake has been maintained at an approximate elevation of 2437.64 feet msl during the summer months as required by Idaho Code § 70-507 since 1951. This elevation constitutes the "high water mark" of the lake, artificial or natural, and represents the line to which the bed of the lake is administered by the State. *Schanilec Affidavit*, ¶ 5. Exhibits B and C accompanying the *Schanilec Affidavit* illustrate the approximate shoreline and where the subject fill lies with respect to this elevation. Thus, under the plain language of Idaho Code §§ 58-1301 and 1302(b), IDL has jurisdiction over the subject Hudson fill under the LPA because it is below the high water mark elevation, whether it be natural or artificial.

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<sup>6</sup> The "artificial high water mark" is defined by Idaho Code § 58-1302(d) as "the high water elevation above the natural or ordinary high water mark resulting from the construction of man-made dams or control works and impressing a new and higher vegetation line." The "natural or ordinary high water mark" is defined by Idaho Code § 58-1302(c) as "the high-water elevation in a lake over a period of years, uninfluenced by man-made dams or works, at which elevation the water impresses a line on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes." See also Idaho Code § 58-104(9) (similar definition of OHWM, without reference to man-made structures).

The LPA requires a lake encroachment permit before an encroachment can be made over the beds, waters or airspace of a navigable lake in Idaho: “No encroachment on, in or above the beds or waters of any navigable lake in the state shall hereafter be made unless approval therefor has been given as provided in this act.” Idaho Code § 58-1301. IDL does not permit fills in lakes such as the Hudson fill, however. Pursuant to IDAPA 20.02.04.032.02,<sup>7</sup> Rule 030.02, a nonnavigational<sup>8</sup> encroachment, such as the Hudson earthen fill, will be approved only in rare circumstances not present here:

Encroachments not in aid of navigation in navigable lakes will normally not be approved by the department and will be considered only in cases involving major environmental, economic, or social benefits to the general public. Approval under these circumstances is authorized only when consistent with the public trust doctrine and when there is no feasible alternative with less impact on public trust values.

IDAPA 20.03.04.030.02. As set forth in the *Schanilec Affidavit*, ¶ 9, the subject fill provides no major environmental, economic or social benefit to the general public – the only benefit is to the Hudson property. IDL therefore requires removal of the fill from the bed of Priest Lake.

*Schanilec Affidavit*, ¶ 9.

Pursuant to Idaho Code § 58-1308(1), the Board has the authority “and it shall be its duty to seek injunctive relief from the appropriate district court to restrain any person from encroaching on, in or above the beds or waters of a navigable lake until approval therefor has been obtained as provided in this chapter.” I.C. § 58-1308(1). Pursuant to Idaho Code § 58-1309, the Court shall order a person found violating to LPA to “restore the lake to as near its condition immediately prior to the unauthorized encroachment or to effect such other measures

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<sup>7</sup> IDAPA20.02.4.000 *et seq.* are the *Rules for the Regulation of Beds, Waters, and Airspace Over Navigable Lakes in the State of Idaho*, and are IDL’s administrative rules under the LPA.

<sup>8</sup> Navigation and nonnavigational encroachments are defined by Idaho Code §§ 58-1302(h) and (i). A fill such as the Hudson fill is not constructed primarily in the aid of navigation and thus is considered nonnavigational.

as recommended by the board and ordered by the Court toward mitigation of any damage caused by or resulting from such unlawful encroachment.” I.C . § 58-1309.


Defendant Hudson has refused to remove the subject fill despite IDL’s demands that he do so. *Schanilec Affidavit*, ¶¶ 7, 12. Therefore, the State brought the above-captioned action pursuant to Idaho Code § 58-1308(1) to compel removal of the fill. There is no question of material fact, and as a matter of law, the State has authority to obtain a Court order compelling removal of the subject fill pursuant to the LPA, regardless of whether the high water mark of Priest Lake at elevation 2437.64 feet msl is natural or artificial.

IDL therefore respectfully requests that the Court issue a mandatory injunction ordering Hudson to (a) remove all unauthorized fill below elevation 2437.64 feet msl during the low water period of Priest Lake, between about November 1 and March 1; (b) stabilize any unstable bank or lake bed remaining landward of elevation 2437.64 feet msl of Priest Lake; and (c) perform any other measures recommended by IDL designed to contain sediment and erosion and to restore Priest Lake to as near its condition immediately prior to the unauthorized encroachment as possible. The State also respectfully requests a permanent injunction to prohibit Hudson from encroaching on, in or above the beds, waters and airspace of Priest Lake unless and until approval therefor is obtained from IDL as required by the LPA. Finally, the State respectfully requests that Hudson be fined \$10,000 for his violation of the LPA and failure to comply with the State’s removal order.

## CONCLUSION

As a matter of law, the State has regulatory authority over the subject Hudson fill pursuant to the LPA, regardless of whether the high water mark of Priest Lake of 2437.64 feet msl is natural or artificial. Private fills such as that constructed by Hudson are not authorized by the LPA Rules, and the Court should order removal of the fill and restoration of the lakebed to as near its original condition as possible.

DATED this 14th day of April, 2016.


  
ANGELA SCHAER KAUFMANN  
Deputy Attorney General

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of April 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

JOHN MAGNUSON  
1250 NORTHWOOD CENTER CT STE A  
COEUR D'ALENE ID 83816

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: (208) 667-0500
- ☐ E-Mail:

  
ANGELA SCHAER KAUFMANN  
Deputy Attorney General  
Idaho Department of Lands



ORIGINAL

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

JAN 18 2015

CLERK DISTRICT COURT  
DEPUTY

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

STEVEN W. STRACK  
Deputy Attorney General  
Acting Chief, Natural Resources Division

ANGELA SCHAER KAUFMANN, ISB # 5436  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
PO Box 83720  
Boise, ID 83720-0010  
Tele: (208) 334-4120  
FAX: (208) 854-8072

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE BOARD OF LAND	)	Case No. CV 2015-1075
COMMISSIONERS and IDAHO DEPARTMENT OF	)	
LANDS,	)	
	)	AFFIDAVIT OF MICK
Plaintiffs,	)	SCHANILEC
	)	
vs.	)	
	)	
PHILIP HUDSON,	)	
	)	
Defendant.	)	
	)	
PHILIP HUDSON,	)	
	)	
Counterclaim Plaintiff,	)	
	)	
vs.	)	
	)	
STATE OF IDAHO, IDAHO STATE BOARD OF LAND	)	
COMMISSIONERS and IDAHO DEPARTMENT OF	)	
LANDS,	)	
	)	
Counterclaim Defendants.	)	

AFFIDAVIT OF MICK SCHANILEC - 1

**ORIGINAL**

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

STEVEN W. STRACK  
Deputy Attorney General  
Acting Chief, Natural Resources Division

ANGELA SCHAER KAUFMANN, ISB # 5436  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
PO Box 83720  
Boise, ID 83720-0010  
Tele: (208) 334-4120  
FAX: (208) 854-8072

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

2015 APR 18 AM 11:20

CLERK DISTRICT COURT  
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Counterclaim Defendants.

Case No. CV 2015-1075

**AFFIDAVIT OF MICK  
SCHANILEC**

I, MICK SCHANILEC, being first duly sworn upon oath, depose and state as follows:

1. I am the Area Manager for the Priest Lake Supervisory Area for the Idaho Department of Lands ("IDL") at Coolin, Idaho, and have been employed in this position for 13 years. Prior to being the Area Manager, I held various positions for IDL at Priest Lake starting in 1985. This has included 3 seasons of temporary forestry work, 4 years as Resource Manager (Cottage Sites/Navigable Waters), 11 years as Resource Manager Senior (Forestry) and 1 year as Resource Supervisor (Forestry). My cumulative resource management experience with IDL at Priest Lake exceeds 30 years.

2. I obtained a Bachelor of Science Degree in Forest Resource Management from the University of Montana in 1985.

3. The statements in this Affidavit are based upon my personal knowledge.

4. My job responsibilities during my tenure at the Idaho Department of Lands have included assisting IDL with the administration of enforcement of the Idaho Lake Protection Act, Idaho Code title 58, chapter 13 ("LPA"), at Priest Lake. These responsibilities have included processing applications for new encroachments, inspecting existing and new encroachments, and handling matters of lake encroachments that are unpermitted or otherwise not in compliance with the LPA. I have been performing these duties at Priest Lake as part of my job responsibilities for approximately 17 years.

5. IDL administers the LPA at Priest Lake to the elevation of 2437.64 feet above mean sea level (msl), datum of 1929, supplementary adjustment of 1947, which the State considers the natural or ordinary high water mark. This is the summer elevation at which Priest Lake is maintained during the summer months at Priest Lake in accordance

with Idaho Code § 70-507. The elevation of Priest Lake is normally drawn down starting in October of every year, and then the 2437.64 feet msl elevation is maintained after the lake recedes to this elevation following spring runoff every year.

6. Lake Encroachment Permit L-97-S-983 was issued to Philip Hudson on or about July 1, 1997, for a 5' X 32' fixed pier, a 5' X 8' ramp, a 6' X 25' dock, a 32' X 38' 2-slip joint family dock, 2 pilings and an anchor. A true and accurate copy of this Lake Encroachment Permit is attached hereto as Exhibit A and incorporated herein by reference. No fill below elevation 2437.64 feet msl was authorized by this permit.

7. In July of 2014, Carl Ritchie, a Senior Resource Specialist, Lands, Minerals and Range, investigated a complaint about an unauthorized encroachment in Priest Lake adjacent to the upland property owned by the Defendant Philip Hudson ("Hudson"). Mr. Ritchie reviewed a series of historic aerial photos and noted what appeared to be a lakebed fill area consisting of an elevated beach and a sea wall adjacent to the Hudson property.

8. The fill in question is a nonnavigational encroachment, i.e., it was not constructed primarily for use in the navigability of the lake. Pursuant to Rule 030.02 of the *Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in Idaho* ("LPA Rules"), IDAPA 20.03.04.013.02, nonnavigational encroachments will be considered for permitting by IDL under the LPA only if the encroachment provides major environmental, social or economic benefits to the general public.

9. Mr. Ritchie apprised me of his observations concerning the Hudson fill, and our investigation showed that there was no lake encroachment permit for this fill. In response to these observations, IDL sent Phillip Hudson a certified letter on July 17,

2014, attached hereto as Exhibit D and incorporated herein by reference. Mr. Hudson was notified that he needed to submit a plan within 30 days to address removal of the unapproved fill because it is unpermitted. In addition, the fill is not permittable pursuant to Rule 030.02 of the LPA Rules, because it provides no major environmental, economic or social benefits to the public. Thus, IDL requires removal of the fill.

10. Following a series of written requests to extend the time period to respond, Hudson submitted a response to IDL through legal counsel on March 16, 2015. The Hudson response also included the recommendations of Drew Dittman, dated February 2, 2015. After reviewing these documents, I inspected the Hudson shoreline area on March 26, 2015, with Carl Ritchie. Attached hereto as Exhibits B and C are true and accurate photographs of the encroachments (the fill) that I observed during my inspection. I drew a yellow line roughly around the encroachment that was being investigated. The fill consists of sand, soil, rocks, cement and seedlings that have either been planted or have seeded in since fill establishment. Exhibit B shows the fill from the north looking south, and Exhibit C shows the fill from the south looking north.

11. As can be seen on Exhibit B, the subject Hudson fill extends lakeward from the shore of Priest Lake. The eastward edge of the yellow line approximates the summer shoreline of Priest Lake at approximately 2437.64 feet msl. The fill extends along about forty (40) feet of shoreline and twenty (20) to twenty-five (25) into the lake from elevation 2437.64 feet above mean sea level. Thus, all of the material delineated within the yellow lines in these photographs is located lakeward, or below, elevation 2437.64 feet msl. Exhibits B and C are photographs taken by me, and they fairly and accurately depict the Hudson fill, which I have personally inspected. On March 26, 2015,

I estimated the approximate amount of unauthorized fill material that needs to be removed at fifty (50) cubic yards.

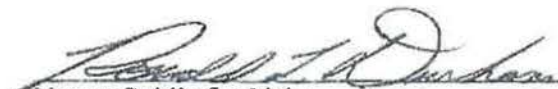
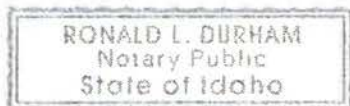
12. IDL has repeatedly attempted to convince Hudson to remove the unauthorized fill, but he has not done so. To date, the fill remains in place below elevation 2437.64 feet msl as shown in Exhibits B and C.

DATED this 7<sup>th</sup> day of April, 2016.



MICK SCHANILEC  
Area Manager, Priest Lake  
Idaho Department of Lands

SUBSCRIBED AND SWORN before me this 7<sup>th</sup> day of April, 2016.



Notary Public for Idaho  
Residing at: Coon, ID  
My Commission expires: 8/3/2018



**CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of April 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

JOHN MAGNUSON  
1250 NORTHWOOD CENTER CT STE A  
COEUR D'ALENE ID 83816

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: (208) 667-0500
- ☐ E-Mail:

  
ANGELA SCHAER KAUFMANN  
Deputy Attorney General  
Idaho Department of Lands



IDAHO DEPARTMENT OF LANDS

PRIEST LAKE AREA OFFICE  
CAVAHAUGH BAY # 132  
COOLIN, IDAHO 83821  
PHONE: 443-2518

STANLEY F. HAMILTON - DIRECTOR

July 1, 1997

Philip Hudson  
E 4606 Lane Park Rd  
Mead WA 99021

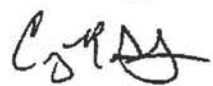
Dear Philip Hudson:

Enclosed is Encroachment Permit #L-97-S-983 for your joint family dock in accordance with the application you filed with this office.

Please read and comply with all special terms and conditions of this permit. Note also that this permit is not valid until the number assigned is displayed upon the dock or piling and proof of recordation with Bonner County is furnished to this office.

Thank you for your cooperation.

Sincerely,



Craig R. Glazier  
Resource Manager Sr.  
Priest Lake

CRG

c: BNW, CDA

KEEP IDAHO GREEN  
PREVENT WILDFIRE

89  
EQUAL OPPORTUNITY EMPLOYER

Exhibit A

STANLEY F. HAMILTON - DIRECTOR

ENCROACHMENT PERMIT L-97-S-983

Permission is hereby granted to Philip Hudson  
of E 4606 Lane Park Rd Mead WA 99021 to  
construct and maintain 5'X 32' fixed pier, 5'X 8' ramp, 6'X 25'  
dock, 32'X 38' 2 slip joint family dock, 2 pilings and an anchor

to be located as follows: Adjacent to  
lots 29 and 30 in South Shores Addn, HBC, Sec 3, T61N, R4W, BM,  
Bonner Co

1. All applicable provisions of the Rules for Regulation of Beds, Waters and Airspace over Navigable Lakes and Streams in the State of Idaho, are incorporated herein by reference and made a part thereof.
2. Construction will follow details and specifications shown on the approved drawings and data provided by the applicant. Should such information and data prove to be materially false, incomplete and/or inaccurate, this authorization may be modified, suspended or revoked upon notice and hearing as provided for in the adopted rules.
3. This permit does not convey the State's title to or jurisdiction or management of lands lying below the natural or ordinary high water mark.
4. Acceptance of this permit constitutes permission by the Permittee for representatives of the Department of Lands to come upon Permittee's lands at all reasonable times to inspect the encroachment authorized by this permit.
5. The Permittee assumes all liability for damages which may result from the exercise of this permit.
6. This permit does not relieve the Permittee from obtaining additional local or Federal permits as required.
7. This permit is not valid until the number assigned is displayed in letters not less than 3 inches in size upon the dock or piling.
8. If the activity authorized herein is not completed on or before the 1st day of July, 2000 (3 years from the date of issuance), this permit shall automatically expire unless it was previously revoked or otherwise extended.

ENCROACHMENT PERMIT NO. L-97-S-983

Page 2

9. White bead foam flotation shall be completely encased in a manner that will maintain the structural integrity of the foam. The encasement shall be resistant to the entry of rodents.
10. This permit supersedes and voids any permit previously issued for this property unless otherwise noted.
11. Creosote or pentachlorophenol (Penta) treated piling and lumber shall not be used on, in, or over the water. Piling and lumber that are in continual contact with lake waters shall not be treated with these protection materials. Contact Idaho Department of Health and Welfare, Division of Environmental Quality, in Coeur d'Alene, Idaho at (208) 769-1422 for information on acceptable treatment methods and materials.
12. The Permittee shall maintain the structure or work authorized herein in a good and safe condition and in accordance with the plans and drawings attached hereto.
13. Chapter 13, Title 58, Idaho Code, 58-1306(e) requires recordation of this permit in the records of Bonner County (215 South 1st, Sandpoint, Id. 83864, (208) 265-1432) as a condition of issuing the permit. Proof of recordation shall be furnished to this office by the Permittee within 30 days of the date listed on this permit or the permit is not valid.
14. Removal and proper disposal of any pre-existing facilities is a condition of this permit.

FOR THE DIRECTOR

By: C. R. S.

Craig R. Glazier

Resource Mgr. Sr., Priest Lake

STATE OF IDAHO )

)

ss

COUNTY OF BONNER )

Subscribed and sworn to before me this 1<sup>st</sup> day of July 1997.

Sherrie Lynne Mayer  
Sherrie Lynne Mayer  
Notary Public for Idaho  
Residing at Coeur d'Alene, Id  
Commission expires: 7-10-2000



Lot 28 & 21 RCR  
~~Lot 29, 30~~  
S. STILES ADD.

JOINT APPLICATION FOR PERMIT  
U.S. ARMY CORPS OF ENGINEERS  
AND  
STATE OF IDAHO, DEPARTMENT OF WATER RESOURCES  
STATE OF IDAHO, DEPARTMENT OF LANDS

SEPARATE PERMIT DECISIONS MUST  
BE RECEIVED FROM BOTH THE STATE  
OF IDAHO AND THE CORPS OF  
ENGINEERS PRIOR TO START OF  
WORK

The Department of the Army permit program is authorized by Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. These laws require permits authorizing structures and work in or affecting navigable waters of the United States and the discharge of dredged or fill material into waters of the United States, including their adjacent wetlands. State permits are required under the State of Idaho, Stream Channel Protection Act (Title 42, Chapter 38, Idaho Code) and the Idaho Lake Protection Act, Section 58-142 et. seq, Idaho Code. This application will meet the requirements of the above agencies.

1. Corps of Engineers # _____ Date Received _____	2. State of Idaho # _____ Date Received _____
--	--

PLEASE TYPE OR PRINT

3. Applicant Philip M. Hudson  
Mailing Address 4606 E. Lane Park Road  
Mead WA 99021  
Work Phone (Area) 467 1234 Home (Area) 467 3434  
Fax Number 509 467 1235

4. Authorized Agent COPPER BAY CONST.  
Mailing Address HC01 Box 89  
NORMAN ID. 83849  
Work Phone (Area) 443-2175 Home ( ) \_\_\_\_\_  
Date of Application April 20, 1977

5. Location where proposed activity exists or will occur.

Waterway PIREST LAKE  
Coolin  
In or near city or town \_\_\_\_\_  
County BONNER State ID. Zip Code 83821

Tributary of: \_\_\_\_\_  
Assessor's Desc. (Tax No. or Subdivision, Lot & Block No.)  
\* \_\_\_\_\_ (See Instructions)

1/4 1/4 Section Township Range or  
UTM Coordinate Grid \_\_\_\_\_

6. Describe the proposed activity, including description of the type of structures, if any, to be erected on fills, or pile or float-supported platforms. If additional space is needed, use a separate sheet or Section 16 (Remarks).

Construct & Install a Fixed Pier Walkway and Floating  
Swim Dock using Piling and concrete anchors.

Describe construction methods and equipment:

Barge mounted Pile Driver, Cedar log  
floating dock

List all soil series located at project site, and indicate if any are on the county's hydric soils list:

Glacial Till & gravel Base

Length of project along the stream or extension into lake or reservoir: 38 ft

Will material be placed waterward of ordinary high water mark? No If yes, volume: \_\_\_\_\_ (cubic yards)  
(both temporary and permanent)

Will material be placed in wetlands? No If yes, area: \_\_\_\_\_ (acres)

Type and composition of fill material: DNA (i.e. sand, etc.) Material Source: \_\_\_\_\_

Will excavation be required? No If yes, volume: \_\_\_\_\_ (cubic yards) Composition: \_\_\_\_\_

Disposal site for excavated material: \_\_\_\_\_ Method of dredging: \_\_\_\_\_

Stream gradient: \_\_\_\_\_

Method of controlling turbidity: DNA

7. Size and flow capacity of proposed bridge or culvert and area of drainage served (sq. miles):  
(Idaho Department of Water Resources requirement.) DNA

8. Preparation of drawings. One set of original or good quality reproducible drawings must be attached to this application. NOTE: DRAWINGS NO LARGER THAN 8-1/2 X 11 INCHES IN SIZE. See the instruction pamphlet for instructions and a checklist for completing the drawings. Include photographs of the project site mounted on 8-1/2 x 11 sheets.

9. Purpose and intended use: Commercial \_\_\_\_\_ Public \_\_\_\_\_ Private ☒ Other \_\_\_\_\_

Describe FLOATING DOCK

Necessity and justification for project BOAT MOORAGE and Swimming.

10. Proposed Starting Date May 1, 1997 Estimated Duration 2 weeks

11. If any portion of the activity is complete, indicate month and year of completion N/A  
Indicate the existing work on the drawings.

12. Names, addresses, and telephone numbers of adjoining property owners, lessees, etc., whose property also adjoins the waterway.

HUCKLEBERRY, Day Co. W. 201 North River Drive Saksam 99201 509/459-6100

☐ Check here if the alteration is located on endowment lands administered by the Idaho Department of Lands

13. LEGAL OWNER IF  
OTHER THAN APPLICANT \_\_\_\_\_

MAILING ADDRESS \_\_\_\_\_ CITY, STATE, ZIP CODE \_\_\_\_\_

PHONE \_\_\_\_\_ AREA \_\_\_\_\_ WORK ( ) \_\_\_\_\_ HOME ( ) \_\_\_\_\_

14. List other applications, approvals, or certifications from other Federal, Interstate, state, or local agencies for any structures, constructions, discharges, deposits, or other activities described in the application.

Issuing Agency	Type of Approval	Identification No.	Date of Application	Date of Approval
----------------	------------------	--------------------	---------------------	------------------


15. Has any agency denied approval for the activity described herein or for any activity directly related to the activity described herein? Yes \_\_\_\_\_ No \_\_\_\_\_ (if "Yes" explain)

16. Remarks or additional information: \_\_\_\_\_

17. Application is hereby made for a permit or permits to authorize the activities described herein. I certify that I am familiar with the information contained in this application, and that to the best of my knowledge and belief, such information is true, complete, and accurate. I further certify that I possess the authority to undertake the proposed activities. I hereby grant to the agencies to which this application is made, the right to come upon the above-described location to inspect the proposed or completed work.

Date April 22 1997

Phil M. Hudson  
Signature of Applicant (REQUIRED)

The application must be signed by the applicant. If an authorized agent is to be designated, Item 4 and the following information should be completed.

I hereby designate Copper Bay Construction to act as my agent in matters related to this permit application. I understand that if a Federal permit is issued, I must sign the permit.

Date April 22 1997

Signature of Authorized Agent (if applicable)

Phil M. Hudson  
Signature of Applicant (if applicable)

18 U.S.C. Section 1001 provides that: Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly falsifies, conceals, or covers up by any trick, scheme, or device a material fact or makes any false, fictitious, or fraudulent statements or representations or makes or uses any false writing or document knowing same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than 5 years or both. Do not send a federal permit processing fee with this application. The appropriate fee will be assessed when a permit is issued.

DO NOT SEND FEDERAL PROCESSING FEE WITH APPLICATION



04 20 00 11:12AM FROM COSTER DAY CCHOT

TO

1803267324

P.02

IDAHO DEPARTMENT OF LANDS  
ATTACHMENT FOR ENCROACHMENTS

Required when applying for an Idaho  
Department of Lands' Lake Encroachment Permit

"Joint Applications" for encroachments must be submitted and signed by the riparian landowner or his lessee. The application must include the exact legal description of the upland property. A riparian owner is the person whose upland property extends to the ordinary high water mark of the waterway. The application must be accompanied by a vicinity map showing the precise location of the proposal, design drawings showing dimensions to adjacent property boundaries, names of adjacent landowners, exact encroachment dimensions, water depth and lakebed profile, all related to the ordinary high water marks. A sample of acceptable drawings is shown on page 14 of the pamphlet.

Docks should be installed at right angles to the general shoreline, should not extend beyond a depth necessary for customary navigation, cannot exceed 700 square feet in area or 10 feet in width (excepting the overall width of a dock with a slip cutout), and may not be closer than 10 feet to adjacent boundaries as extended into the water perpendicularly from the general shoreline. If the proposal is closer than 10 feet from adjacent property lines, written consent of the adjacent riparian landowner must be obtained below:

I, HUNKLEBERRY BOY COMPANY, am the owner or riparian or littoral property adjacent to the property listed in this application. I am familiar with the scope and location of the proposed encroachment as evidenced by accompanying plans which I have initialed. I offer no objection to the encroachment.

4/20/97  
Date

David M. B. H.  
Name

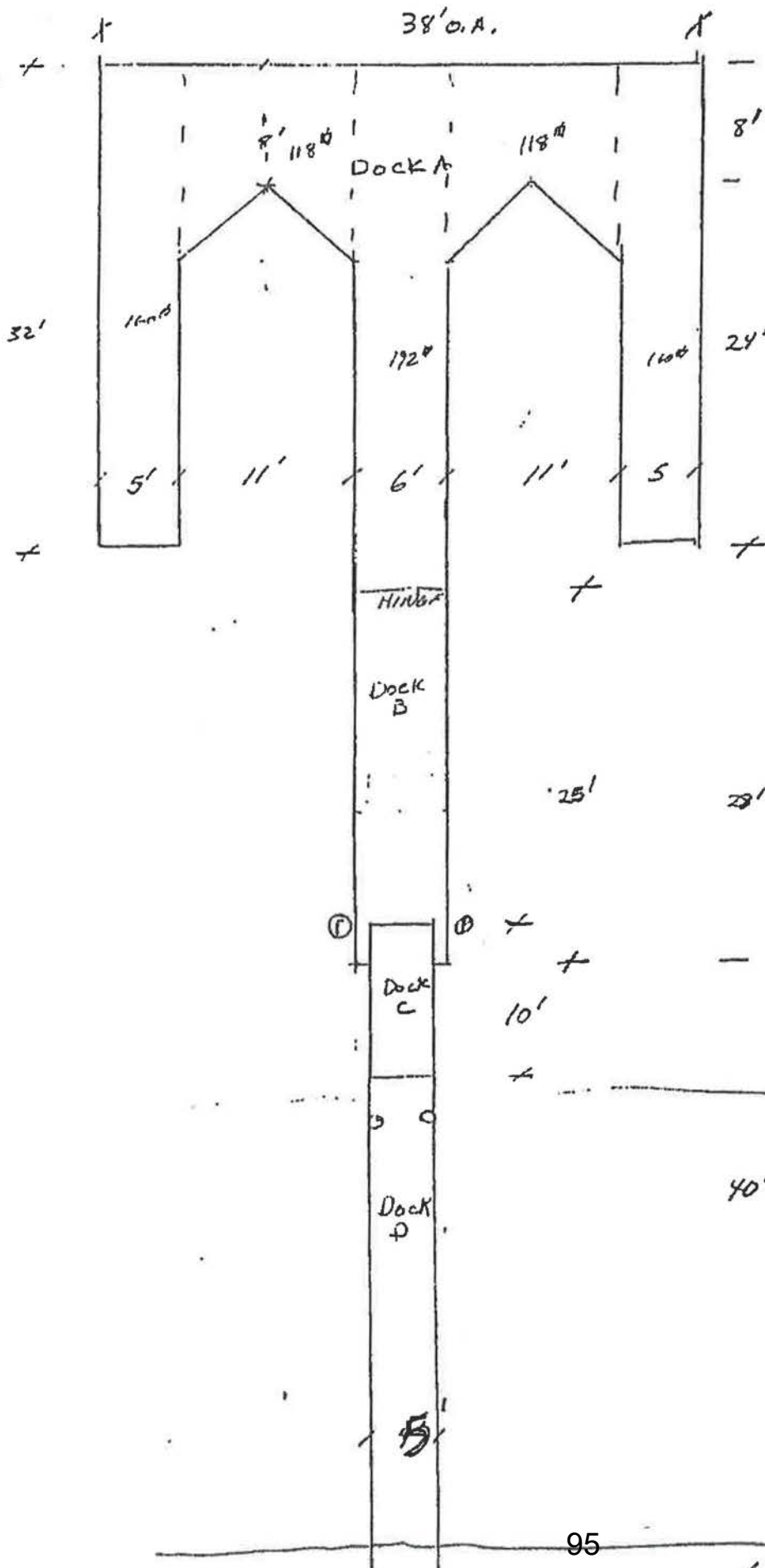
201 25 Smith Street  
Address

I, \_\_\_\_\_, am the owner of riparian or littoral property adjacent to the property listed in this application. I am familiar with the scope and location of the proposed encroachment as evidenced by accompanying plans which I have initialed. I offer no objection to the encroachment.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Name

\_\_\_\_\_  
Address



HUDSON

- 100' O.A. -

L.W.M.

SQUARE FOOTAGE

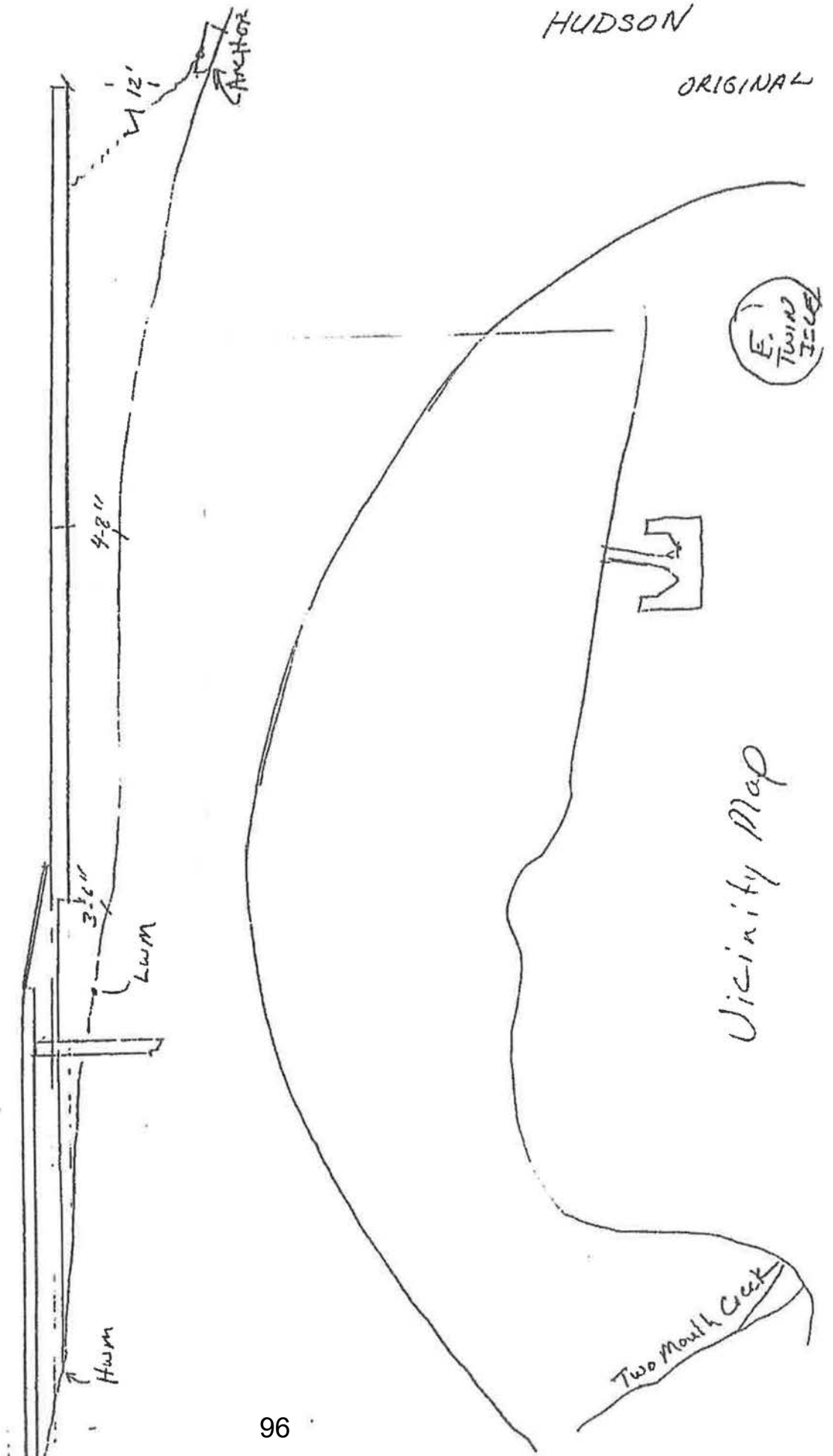
Dock A -	748 <sup>#</sup>
Dock B -	150 <sup>#</sup>
Dock C -	40 <sup>#</sup>
Dock D -	<del>20</del> <sup>#</sup>
(coverwater)	160
Total	1058

40' 1/4

HWM

HUDSON


ORIGINAL



## GENERAL MESSAGE

<b>TO:</b> <u>Will Pitman</u>		POSITION
<b>FROM:</b> <u>CRAIG GLAZIER</u>		POSITION
<b>SUBJECT:</b> <u>EA # L-97-S-983</u> <u>CHECK # 2956</u>		<b>DATE:</b> <u>5/6/97</u>
<b>MESSAGE:</b>		

ENCLOSED IS CHECK # 2956 FOR EA # L-97-S-983 — PERMIT  
WILL FOLLOW

	<b>PHILIP M. HUDSON, DDS</b>		<b>2956</b> 28-8/1251
	<b>JAN W. HUDSON</b> E. 4606 LANE PARK RD. 466-3434 MEAD, WA 99021		
Pay to the order of	<u>Treasurer - State of Idaho</u>		<u>4 22 97</u>
<u>Fifty</u>	<u>\$50.00</u>		Dollars
Washington Trust Bank P.O. BOX 2127 SPOKANE, WASHINGTON 99110-2127			
<u>L-97-S-983</u>			
For	<u>Application Fee</u>		<u>[Signature]</u>
⑆ 625100089⑆ 1006844872⑆ 2956			

DATE	TIME	SIGNATURE/POSITION

213 ICS 1/79  
NFES 1336

PERSON RECEIVING GENERAL MESSAGE KEEP THIS COPY

(SENDER:) REMOVE THIS COPY. FOR YOUR FILES











PRIEST LAKE  
SUPERVISORY AREA  
4053 Cavanaugh Bay Rd  
Coolin ID 83821  
Phone (208) 443-2516  
Fax (208) 443-2162



TOM SCHULTZ, DIRECTOR  
*An equal opportunity employer*

STATE BOARD OF LAND COMMISSIONERS  
*C. L. "Butch" Otter, Governor*  
*Ben Ysursa, Secretary of State*  
*Lawrence G. Wasden, Attorney General*  
*Brandon D. Woolf, State Controller*  
*Tom Luna, Sup't of Public Instruction*

July 17, 2014

CERTIFIED

Philip Hudson  
E. 4606 Lane Park Rd.  
Mead, WA 99021

Re: Unapproved Artificial Fill Below the Ordinary High Water Mark, Priest Lake

Dear Mr. Hudson:

A few weeks ago while performing navigation/encroachment permit work on Priest Lake I noticed your lot 29 at Sandy Shores appeared to have an elevated beach retained with a sea wall. After reviewing our aerial photo records and other aerial photos from Google earth there appears to be an artificially filled area lakeward from the ordinary high water mark. The filled area as it appears on a Google earth photo September 6, 2012 is approximately 35 feet N-S X 22 feet E-W at the widest point. This extends northward along the shoreline from the north side of your dock's approach.

Enclosed is a series of aerial photos starting in 1998. In 1998 the dock was in place having been permitted in 1997 (L-97-S-983) and there is no evidence of any lakebed filling from the ordinary high water mark. The next aerial photo from 2004 taken after the residence on lot 29, Sandy Shores was built shows lakebed fill. In 2012, the aerial photo shows lakebed fill and a sea wall in better detail.

From these aerial photos it is evidence that the artificial fill over the lakebed and below the ordinary high water mark has occurred after the Lake Protection Act of 1974. You have 30 days from the date of this letter to submit a plan for your deeded lot 29, South Shores, addressing the removal of all fill over the lakebed that is below the ordinary high water mark, Priest Lake. An on-site visit by this office is necessary.

**Exhibit D**

If you have any questions, please contact me at [critchie@idl.idaho.gov](mailto:critchie@idl.idaho.gov) or (208) 443-2516 Monday – Friday between 8:00AM and 4:30PM (PDT). A site visit can be scheduled

Sincerely,

Carl Ritchie  
Lands Coordinator/Nav Waters  
Priest Lake

Enclosure

cc: File

7008 1300 0000 7455 7092

U.S. Postal Service	
CERTIFIED MAIL RECEIPT	
(Domestic Mail Only; No Insurance Coverage Provided)	
For delivery information, visit our website at <a href="http://www.usps.com">www.usps.com</a>	
CF CIA USE	
Postage	\$ 0.70
Certified Fee	3.30
Return Receipt Fee (Endorsement Required)	2.70
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$ 6.70
Postmark Here	
Sent To	Philip Hudson
Street, Apt. No., or PO Box No.	E 4606 Lane Park Rd
City, State, ZIP+4	Mead WA 99021
PS Form 3800, August 2005 See Reverse for Instructions	

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"><li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li><li>Print your name and address on the reverse so that we can return the card to you.</li><li>Attach this card to the back of the mailpiece, or on the front if space permits.</li></ul>	<p>A. Signature <i>Philip Hudson</i></p> <p>B. Received by (Printed Name)</p> <p>C. Date of Delivery 7/21</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>
1. Article Addressed to: Philip Hudson E 4606 Lane Park Rd Mead WA 99021	3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.
2. Article Number (Transfer from service label)	4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes

7008 1300 0000 7455 7092





Google earth

feet 200  
meters 80



9/6/2012





Google earth

feet  
meters



*PHOTO FROM  
9/6/2012*





Image USDA Farm Service Agency

Google earth

Google earth

feet 300  
meters 100



9/26/2004



Google earth

feet 300  
meters 100



8/10/1998





STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

May 3, 2016

The Honorable Barbara Buchanan  
Judge of the Bonner County District Court  
215 S. First Avenue  
Sandpoint, ID 83864

Re: State of Idaho et al. vs. Hudson  
Case No. CV-2015-1075

Dear Judge Buchanan:

Due to a clerical error, you were not provided with color copies of Exhibits B and C of the *Affidavit of Mick Schanilec* filed with the court on April 18, 2016. Enclosed, please find color copies of those exhibits.

I apologize for any inconvenience this may have caused.

Sincerely,

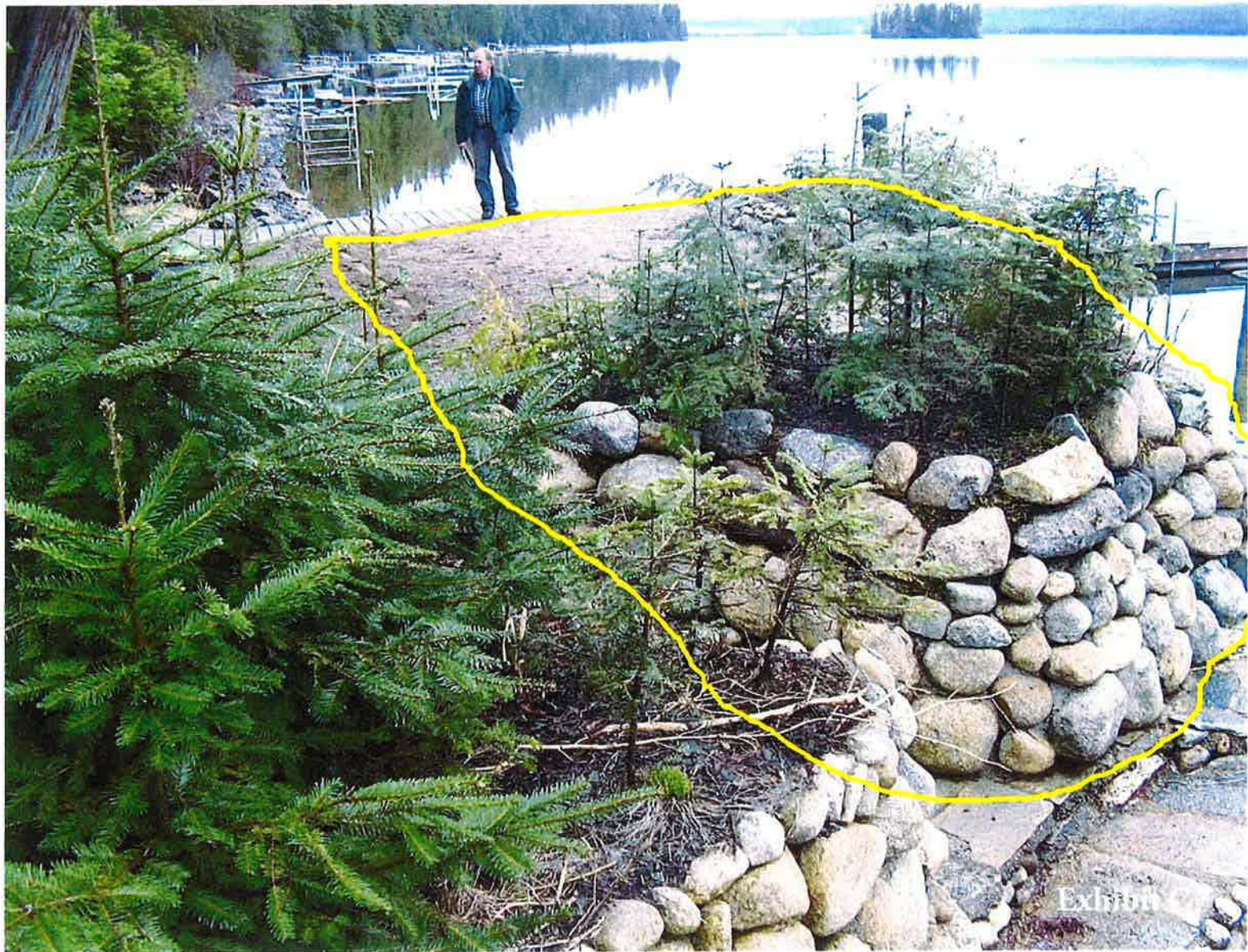
A handwritten signature in blue ink that reads "Melinda Bouldin".

MELINDA BOULDIN  
Legal Secretary  
Natural Resources Division

/mb  
Enclosures  
cc: John Magnuson (without enclosures)









**ORIGINAL**

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State of Idaho

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STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

2015-10-18 AM 11:26

CLERK OF DISTRICT COURT  
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE BOARD OF LAND	)	<b>Case No. CV 2015-1075</b>
COMMISSIONERS and IDAHO DEPARTMENT OF	)	
LANDS,	)	<b>AFFIDAVIT OF</b>
	)	<b>MATTHEW ANDERS</b>
Plaintiffs,	)	
	)	
vs.	)	
	)	
PHILIP HUDSON,	)	
	)	
Defendant.	)	
	)	
PHILIP HUDSON,	)	
	)	
Counterclaim Plaintiff,	)	
	)	
vs.	)	
	)	
STATE OF IDAHO, IDAHO STATE BOARD OF LAND	)	
COMMISSIONERS and IDAHO DEPARTMENT OF	)	
LANDS,	)	
	)	
Counterclaim Defendants.	)	

STATE OF IDAHO    )  
                              )  
COUNTY OF ADA    )       ss.

I, MATTHEW ANDERS, being first duly sworn upon oath, depose and state as follows:

1.       I am a Hydrologist for the Idaho Department of Water Resources (“IDWR”), and have been employed at this position for about one and a half (1.5) years. Prior to my position as a Hydrologist, I have held positions within IDWR as a Geographic Information Specialist (2004 to 2007), and as a Hydrogeologist (2007 to 2014).

2.       I obtained a Bachelor of Arts Degree in Geology from Gustavus Adolphus College in 1992, and a Master of Science Degree from Utah State University in 2003. A copy of my resume is attached hereto as Exhibit A.

3.       The statements in this affidavit are made on the basis of my personal knowledge.

4.       My duties as a Hydrologist for IDWR include the analysis of lake level and river flow data obtained by the United States Geological Survey (“USGS”) from the various lakes and rivers in Idaho. I am familiar with USGS data and publications.

5.       Attached hereto as Exhibit B and incorporated herein by reference is a copy of USGS Priest Lake daily gage height data collected at lake level gages on Priest Lake, Idaho.

6.       From June 1911 to September 1913, the USGS reported data from non-permanent gages on Priest Lake. These data were published by the USGS in the Water Supply Papers series under the title “Surface Water Supply of the United States.” Digital copies of these documents can be downloaded from the following websites: 1912 Water Supply Paper 332 (<http://pubs.er.usgs.gov/publication/wsp332>) and 1913 Water Supply Paper 362 (<http://pubs.er.usgs.gov/publication/wsp362>). The pages from these documents displaying lake stage data for Priest Lake are included in Exhibit B. The data are organized in tables by water year. A water-year runs from October 1 through September 30 of the following year.

7. In 1928, a permanent gage was established near the outlet to the lake (USGS Site Number 12393000). This gage is informally referred to as the "Priest Lake Outlet gage" or "Outlet gage." From April 1928 to September 2015, the USGS reported data from permanent gages on Priest Lake. These data are available digitally on the USGS website ([http://waterdata.usgs.gov/nwis/dv/?site\\_no=12393000&agency\\_cd=USGS&referenced\\_module=sw](http://waterdata.usgs.gov/nwis/dv/?site_no=12393000&agency_cd=USGS&referenced_module=sw)). These data are organized as daily time series values. A true and correct copy of the entire digital dataset downloaded from the USGS website is on a compact disc (CD) included in Exhibit B. These data were not printed because they require 508 pages.

8. Additional information is available on the Water Year Summary page of the website ([http://waterdata.usgs.gov/nwis/wys\\_rpt/?site\\_no=12393000&agency\\_cd=USGS](http://waterdata.usgs.gov/nwis/wys_rpt/?site_no=12393000&agency_cd=USGS)), including information such as the location of the gage, drainage area, records available, extremes in water levels, and miscellaneous remarks. A copy of the additional information for USGS Site Number 12393000 is included in Exhibit B.

9. The Outlet gage is located near the outlet of Priest Lake, near Coolin, Idaho. The locations of the gages used to collect the data in Exhibit B are shown on a USGS quadrangle map (Coolin, Outlet Bay, Priest Lake SE, and Priest Lake SW) included in Exhibit C attached hereto and incorporated herein by reference.

10. In the "Gage" section of the Water Year Summary, reference is made to "datum(s)" or "datum of gage." This describes a point on the gage established as a reference elevation for lake elevation measurement. As explained in Exhibit D, an excerpt from a USGS technical manual titled "Stage Measurement at Gaging Stations," the gage datum is basically an arbitrary number chosen when the measuring gage is first established, which in the case at hand is 1929. Normally, the USGS attempts to establish a datum at or below the normal low water for a particular body of water so that subsequent gage readings are positive number values. At the Outlet gage, most daily readings are positive values, although at times of low water (most commonly during winter), values can go below the datum (less than zero on the gage).



11. In the "Remarks" section of the Water Year Summary, the regulation of Priest Lake is discussed, and it is stated that water storage began on August 9, 1950. This water storage is accomplished by the Outlet dam constructed by the state of Idaho pursuant to Idaho Code § 70-507. Priest Lake is regulated to maintain the water level at about 3.0 feet on the Outlet gage so that the lake does not recede as it naturally did before the dam was constructed, and can be used for recreational purposes during the summer.

12. Streams and lakes in the Pacific Northwest, under natural conditions, show an annual cycle in which the surface elevation of the water ordinarily rises in the spring due to snow melt and precipitation to their highest levels, and then gradually recede to their lowest levels in the summer and fall.

13. A "hydrograph" is a tool used by hydrologists to study the characteristics and behavior of a river or a stream, such as the elevation, flow, or velocity, during different times of the year. Elevation, flow, or velocity data are plotted against time to show how the pertinent variable varies during the year. Hydrographs are used by hydrologists for a variety of water resource management purposes.

14. I calculated a hydrograph of average daily stage for Priest Lake based on the USGS data in Exhibit B. I used data from water year 1930 (October 1929) through water year 2015 (September 2015). Data from June 1911 to September 1913 and from April 1928 to September 1929 are fragmentary, so they were not used in calculating daily average stage values. The results of this calculation are plotted on a hydrograph titled "Daily Average Stage (USGS Gage 12393000)" included in Exhibit E.

15. The hydrograph in Exhibit E was created by averaging all lake level heights on a given day for the periods 1930-1950 (pre-dam) and 1951-2015 (post-dam), then plotting the averages on the graph. For example, all lake elevations for October 1 were averaged during these respective time periods, and that average number was plotted on the graph, all October 2 readings were averaged and plotted, and so on for each day of the year. These points were then joined by a line. The "X" or horizontal axis of the graph shows day of the year; the "Y" or vertical axis shows gage height in feet. The curves for the different time periods are labeled and identified by different colors.

16. The daily average stage calculations were performed utilizing Microsoft Excel (2007), a commonly-used spreadsheet program that is used for storing, organizing,

and manipulating data. The data for the Outlet gage was downloaded from the USGS and then manipulated in Excel. Excel performs all the individual calculations much faster, but the same simple arithmetic averages could be calculated by hand and plotted on a graph. The "Daily Average Stage (USGS Gage 12393000)" graph in Exhibit E was also generated using Excel.

17. Attached hereto as Exhibit F and incorporated herein by reference is the result of the calculations which form the basis for the Priest Lake "Daily Average Stage (USGS Gage 12393000)" hydrograph. Exhibit F contains the calculated average daily stage for the 1930-1950 (pre-dam) period and the 1951 to 2015 (post-dam) period. The table shows the date in the "Day of Year" column, the average daily stage value for that date for the specific time period in the "Water Year 1930-1950 Average Daily Stage (feet)" and "Water Year 1951-2015 Average Daily Stage (feet)" columns. For example, the 1930-1950 period, on October 1, the average daily average stage value was 0.42 feet on the Outlet gage

18. The hydrograph, Exhibit E, for Priest Lake prior to the construction of the Outlet Dam shows the seasonal elevation fluctuation typical of lakes in the Pacific Northwest. Lake level is high in the late spring due to snow melt and precipitation, then recedes through the summer to the lowest levels in August, September and into October.

19. Exhibit E shows the effect that the Outlet Dam has had on the hydrograph of Priest Lake during the summer months. Before 1950, the water level of Priest Lake dropped throughout the summer from high levels in spring to low levels in the fall, and then would stay relatively low until spring snowmelt and runoff. After 1950, normal high water was allowed to recede only to the 3.0 feet Outlet gage level, and was maintained at this level throughout the summer by the Outlet dam as directed by Idaho Code § 70-507. After 1950, the water was allowed to drop in October, and the normal low water of the lake was again attained. Thus, according to the hydrograph and the hydrologic data, the elevation of Priest Lake has been maintained at or near 3.0, or 2437.64 feet msl (NGVD 1929), on the Outlet gage in July, August and September annually since 1951.

DATED this 14<sup>th</sup> day of April, 2016.

Matthew Anders

MATTHEW ANDERS  
Hydrologist  
Idaho Department of Water Resources

SUBSCRIBED AND SWORN before me this 14<sup>th</sup> day of April, 2016.



Kimi A. White

Notary Public for Idaho

Residing at: Boise, Idaho

My Commission expires: 04/01/22

### CERTIFICATE OF SERVICE

I hereby certify that on this \_\_\_\_ day of April 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

JOHN MAGNUSON  
1250 NORTHWOOD CENTER CT STE A  
COEUR D'ALENE ID 83816

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: (208) 667-0500
- ☐ E-Mail:

  
ANGELA SCHAER KAUFMANN  
Deputy Attorney General  
Idaho Department of Lands

**MATTHEW D. ANDERS, P.G.**

3572 Centennial Way  
Boise, ID 83706  
(208) 407-9338  
smse.trout@gmail.com

---

**EXPERIENCE**

**2004-Present Idaho Department of Water Resources, Boise, ID**

**2014-Present Hydrologist**

Surface Water Hydrologist. Duties: updating the methodology for determining injury to water users by developing methods for calculating crop water use, predicting crop water need, and determining the surface/groundwater portions of mixed source water rights; interacting with consultants representing water users in water delivery calls; supporting the Water Right Accounting program by maintaining data processing databases, designing new data processing software, troubleshooting the Water Right Accounting Program code (C#), and documenting the functionality of the Water Right Accounting Reservoir Storage Program (Fortran); completing hydrologic analyses; and supporting the Snake River Planning Model by querying databases to update model input files and writing code (Python) to parse the model output.

**2007-2014 Hydrogeologist**

Co-coordinator of the Idaho Underground Injection Control (UIC) Program. Duties: determining program work plan; evaluating injection well applications to estimate affect on groundwater quality and potential for impact on adjacent domestic wells; developing permit conditions; preparing permits; interpreting Idaho groundwater protection rules; developing agency policy for injection well use; responding to information requests by the public; maintaining and updating Access databases and ArcGIS spatial datasets; writing code (VBA, Python) to automate tasks in Excel, Access, and ArcGIS; and reporting program activities to U.S. EPA. Other duties include assisting the Well Construction program by monitoring well seal placement, responding to questions from the public, querying the Idaho well construction database, and designing 18 pieces of software for the Well Construction, Enforcement, Driller Licensing, and Stream Channel programs.

**2004-2007 GIS Specialist**

An employee of the Idaho Water Resources Research Institute contracted to and located at the Idaho Department of Water Resources. Duties: maintaining spatial and tabular water right databases; automating geoprocessing tasks; creating data/maps/figures; reviewing water right claims for the Snake River Basin Adjudication.

**2003-2004 Geologist/GIS Specialist**

U.S. Geological Survey / Environmental Careers Organization, Menlo Park, CA

Worked as an associate of the Environmental Careers Organization contracted to the USGS Pacific Northwest Geologic Mapping Project. Duties: developing and managing GIS geodatabases; using GIS and Adobe Illustrator to create geologic maps for publication; preparing soils and water well data for use by researchers; creating figures for inclusion in posters and presentations; communicating with researchers regarding issues and progress.

*Anders 1 of 2*



- 2003                      Research Specialist**  
Institute for Tribal Environmental Professionals, Flagstaff, AZ
- Provided support to American Indian tribes working on air quality issues. Duties: developing GIS techniques for determining the proximity of Indian reservations to sources of air pollution; developing and managing GIS databases; creating posters and figures using GIS and Adobe Illustrator; conducting a survey summarizing tribal air quality programs; and presenting results of projects at conferences.
- 1998-2000              Geologist**  
EnPro Assessment Corp., St Paul, MN
- Completed Phase I & II Environmental Site Assessments for commercial transactions. Duties: collecting and evaluating historical and regulatory data; interpreting hydrologic data; conducting site reconnaissance activities; evaluating environmental risks; coordinating field activities related to soil borings and UST removals; collecting soil, water, and asbestos samples; and preparing draft reports.
- 1997                      Environmental Technical Training Coordinator:** U.S. Peace Corps - Kazakstan
- 1995-1997              Environmental Volunteer:** U.S. Peace Corps - Kazakstan
- 1993-1995              Environmental Specialist:** Boise Forte Reservation Tribal Council, Nett Lake, MN

#### EDUCATION & LICENSURE

<b>Bachelor of Arts</b> Gustavus Adolphus College St. Peter, MN <i>Major:</i> Geology <i>Minor:</i> Geography	<b>Master of Science</b> Utah State University, Logan, UT <i>Thesis:</i> The Quaternary Geology & Landscape Evolution of Eastern Grand Canyon.	<b>Professional Geologist</b> State of Idaho Number: PGL-1313
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#### SPECIALIZED SKILLS

- Software: ArcGIS, R, Microsoft SQL Server Management Studio, Adobe Illustrator; Microsoft Word, Excel, Access, and Powerpoint
- Software design, documentation, and development
- Task automation (VBA, Python, C#, & Model Builder)
- Database maintenance and querying
- Trimble GPS and Leica Total Station

CERTIFICATION OF DOCUMENT

STATE OF IDAHO )  
 )  
COUNTY OF ADA ) SS.

I, Matthew Anders, being first duly sworn upon oath, depose and state as follows:

1. I am a hydrologist for the Idaho Department of Water Resources. In that capacity, I am one of the custodians of the books, publications and other documents at the Department of Water Resources' Hydrology Section.
2. The Department of Water Resources, Hydrology Section, has custody of the following Surface Water Supply of the United States, Part XII, North Pacific Drainage Basins publications from the Department of the Interior, United States Geological Survey:
  - a. Water-Supply Paper 332, 1912 (1916)
  - b. Water-Supply Paper 362, 1913 (1917)
3. I do certify that I carefully compared the attached copy of the portion of the documents described in paragraphs 2 with the original and that the attached copy is a true and accurate copy of portions of the original documents described in paragraphs 2.

IN WITNESS WHEREOF, I hereto set my hand this 14<sup>th</sup> day of April, 2016.

Matthew Anders  
Matthew Anders

Subscribed and sworn before me this 14<sup>th</sup> day of April, 2016.



Kimi A. White  
Notary Public for the State of Idaho  
Residing at: Boise, Idaho  
My Commission expires: 04/01/22

DEPARTMENT OF THE INTERIOR

FRANKLIN K. LANE, Secretary

UNITED STATES GEOLOGICAL SURVEY

GEORGE OTIS SMITH, Director

Water-Supply Paper 332

SURFACE WATER SUPPLY OF THE  
UNITED STATES

1912

PART XII. NORTH PACIFIC DRAINAGE BASINS

NATHAN C. GROVER, Chief Hydraulic Engineer

F. F. HENSHAW, G. C. BALDWIN, and W. A. LAMB, District Engineers

Prepared in cooperation with the States of Montana  
Idaho, Washington, and Oregon



Water Resources Branch,  
Geological Survey,  
Box 3106, Capitol Station  
Oklahoma City, Okla.

WASHINGTON

GOVERNMENT PRINTING OFFICE

1916

*Daily discharge, in second-feet, of Prospect Creek near Thompson Falls, Mont., for the year ending Sept. 30, 1912.*

Day.	Oct.	Nov.	Dec.	Feb.	Mar.	Apr.	May.	June.	July.	Aug.	Sept.
1					115						
2			75								
3				84		720					
4						720			149		
5						680	524		197		
6	58							584			
7	55									72	
8										72	
9	53	53									
10											
11					94						
12							980			66	47
13											
14	53								128	66	
15											
16		53								63	
17											
18									109		
19				137							
20					84						
21											
22		66									
23				111				197			
24				137	88					56	
25	50										
26										56	
27						568			92		
28	50										
29											
30											
31									78		

NOTE.—Discharge determined from two fairly well defined rating curves, one used before the construction of the pipe-line trestle in April, 1912, and the other afterwards.

#### PRIEST RIVER AT OUTLET OF PRIEST LAKE, AT COOLIN, IDAHO.

**Location.**—In the SE.  $\frac{1}{4}$  sec. 9, T. 59 N., R. 4 W., in Priest Lake, at Coolin, Idaho, about 2 miles from the outlet.

**Records available.**—June 18 to September 8, 1911; March 2 to April 5, 1912 (fragmentary); July 13 to September 30, 1912.

**Drainage area.**—572 square miles.

**Gage.**—Vertical staff, attached to piles at wharf at Coolin. The original gage used June 18, 1911, to April 5, 1912, had no determined relation to that used after July 12, 1912.

**Channel.**—Channel at the outlet has rocky bed and high banks; probably permanent.

**Winter flow.**—The lake is usually frozen over from January 1 to April 15.

**Accuracy.**—It is proposed to determine the relation between the stage of the lake and the discharge at the outlet. The relation will probably be affected by ice and wind on the lake.

**Cooperation.**—Gage-height record furnished by the United States Forest Service.



*Daily gage height, in feet, of Priest River at outlet of Priest Lake, at Coolin, Idaho, for the years ending Sept. 30, 1911-12.*

Day.	June.	July.	Aug.	Sept.	Day.	June.	July.	Aug.	Sept.
1911.					1911.				
1.....		5.05	3.28	2.59	16.....		4.2	3.06	
2.....		5.5	3.33	2.61	17.....		4.15	3.03	
3.....		5.75	3.33	2.6	18.....	6.2	4.1	3.01	
4.....		5.33	3.30	2.6	19.....	6.15	4.0	3.00	
5.....		5.0	3.30	2.6	20.....	5.95	4.0	2.90	
6.....		4.95	3.27	2.6	21.....	5.8	3.92	2.84	
7.....		4.8	3.25	2.56	22.....	5.75	3.9	2.8	
8.....		4.72	3.26	2.5	23.....	5.7	3.87	2.8	
9.....		4.7	3.23		24.....	5.58	3.8	2.76	
10.....		4.63	3.20		25.....	5.5	3.7	2.72	
11.....		4.57	3.16		26.....	5.4	3.68	2.71	
12.....		4.50	3.16		27.....	5.4	3.6	2.7	
13.....		4.45	3.12		28.....	5.33	3.57	2.7	
14.....		4.38	3.10		29.....	5.3	3.54	2.67	
15.....		4.32	3.07		30.....	5.2	3.5	2.6	
					31.....		3.45	2.6	

Day.	Mar.	Apr.	July.	Aug.	Sept.	Day.	Mar.	Apr.	July.	Aug.	Sept.
1912.						1912.					
1.....		3.40		2.55	1.80	16.....			3.1	2.10	1.90
2.....	2.50	3.40		2.50	1.80	17.....			3.0	2.10	1.90
3.....	2.50	3.40		2.45	1.85	18.....			3.0	2.10	1.90
4.....	2.50	3.45		2.45	1.90	19.....			3.0	2.05	1.90
5.....	2.50	3.50		2.40	1.85	20.....	3.20		3.0	2.00	1.85
6.....	2.54			2.40	1.80	21.....	3.20		2.9	2.00	1.85
7.....	2.54			2.40	1.80	22.....			2.8	1.95	1.80
8.....	2.59			2.40	1.80	23.....			2.8	1.90	1.80
9.....	2.60			2.35	1.95	24.....			2.8	1.90	1.80
10.....	2.70			2.30	2.00	25.....			2.7	1.85	1.80
11.....	2.70			2.30	2.00	26.....			2.7	1.80	1.70
12.....				2.25	1.95	27.....			2.6	1.80	1.70
13.....			3.2	2.20	1.95	28.....			2.6	1.80	1.70
14.....			3.2	2.20	1.95	29.....			2.6	1.75	1.70
15.....			3.1	2.15	1.90	30.....			2.6	1.75	1.70
						31.....	3.30		2.55	1.75	

NOTE.—Gage heights June 18, 1911, to Apr. 5, 1912, were read on original gage, which was not referred to a bench mark and bore no determined relation to gage used after July 12, 1913. These gage heights are useful only as an indication of the relative rise and fall of the lake. The original gage was removed on Apr. 6, 1912, as the pier to which it was attached was destroyed by ice.

#### PRIEST RIVER AT FALK'S RANCH, NEAR PRIEST RIVER, IDAHO.

**Location.**—In sec. 20, T. 57 N., R. 4 W., at Falk's ranch, about 4 miles above lower East Fork of Priest River, 8 miles north of Priest River, and about 18 miles below Priest Lake.

**Records available.**—March 2 to November 20, 1912, when station was discontinued.

**Drainage area.**—792 square miles.

**Gage.**—Vertical staff fastened to tree on left bank.

**Channel.**—Gravel; practically permanent.

**Discharge measurements.**—Made from a cable about 100 feet above the gage, or by wading.

**Winter flow.**—Affected by ice.

**Accuracy.**—Fair; rating curves have been developed, but results are unreliable at times because of effects of log jams and ice.

**Cooperation.**—Discharge measurements, except those of October 14, 1911, and December 24, 1912, have been furnished by the United States Forest Service.

DEPARTMENT OF THE INTERIOR

FRANKLIN K. LANE, Secretary

UNITED STATES GEOLOGICAL SURVEY

GEORGE OTIS SMITH, Director

Water-Supply Paper 362

# SURFACE WATER SUPPLY OF THE UNITED STATES

1913

## PART XII. NORTH PACIFIC DRAINAGE BASINS

NATHAN C. GROVER, Chief Hydraulic Engineer

G. L. PARKER, W. A. LAMB, G. C. BALDWIN, and F. F. HENSHAW  
District Engineers

Prepared in cooperation with the States of  
WASHINGTON, IDAHO, MONTANA, and OREGON



Water Resources Branch,  
Geological Survey,  
Box 3106, Capitol Station  
Oklahoma City, Okla.

WASHINGTON

GOVERNMENT PRINTING OFFICE

1917

## PRIEST RIVER AT OUTLET OF PRIEST LAKE, AT COOLIN, IDAHO.

**Location.**—In the SE.  $\frac{1}{4}$  sec. 9, T. 59 N., R. 4 W., at the southeast end of Priest Lake, at the town of Coolin, about 2 miles southeast of the outlet.

**Records available.**—June 18, 1911, to September 30, 1913; fragmentary.

**Drainage area.**—572 square miles.

**Elevation.**—Low-water stage of lake 2,435 feet above sea level.

**Gages.**—June 18, 1911, to April 6, 1912, and July 13, 1912, to January 8, 1913, two vertical staff gages attached to piers of the wharf at Coolin. These gages were not accurately referred to bench marks and both were torn out by ice; after April 18, 1913, inclined staff gage about 200 feet east of the wharf and 200 feet north of Northern Hotel, and vertical staff on right bank 500 feet below outlet.

**Channel and control.**—One channel at outlet with rocky bed and high banks; probably permanent.

**Discharge measurements.**—Prior to September 17, 1913, made from a boat at outlet; after that date made from a cable.

**Winter flow.**—Lake is usually frozen over from January 1 to April 15.

**Diversions.**—None.

**Storage.**—Natural, in lake.

**Accuracy.**—Gage heights June 18, 1911, to April 6, 1912, valuable only to show relative rise and fall of lake in open season. One current-meter measurement was referred to the gage used July 13, 1912, to January 8, 1913, and approximate estimates for this period have been made by means of a comparison with the gages installed April 18, 1913. A rating curve applicable to the gage at the outlet has been developed and transferred to the inclined gage at Coolin by means of a curve of relation between the two gages. Wind on lake causes changes in stage at Coolin without corresponding changes at outlet; as the discrepancy may not be compensating a rating curve based on gage heights for inclined gage at Coolin may be considerably in error.

**Cooperation.**—Gage-height record furnished by United States Forest Service.

*Discharge measurements of Priest River at outlet of Priest Lake, at Coolin, Idaho, during the year ending Sept. 30, 1913.*

Date.	Made by—	Gage height.		Dis-charge.	Date.	Made by—	Gage height.		Dis-charge.
		Lake gage.	Out-let gage.				Lake gage.	Out-let gage.	
Dec. 25 <sup>a</sup>	James E. Stewart..	Feet. 62.14	Feet. ....	Sec.-ft. 789	Sept. 3	E. W. Kramer.....	Feet. 2.05	Feet. 1.21	Sec.-ft. 620
Aug. 13 <sup>a</sup>	F. B. Storey.....	2.54	1.56	861	Sept. 24	Parker and Baldwin.....	2.05	1.12	494

<sup>a</sup> Made from a boat near present site of cable.

<sup>b</sup> Referred to vertical staff gage on pier of wharf.



## UPPER COLUMBIA RIVER BASIN.

119

Daily gage height, in feet, of Priest River at outlet of Priest Lake, at Coolin, Idaho, for the year ending Sept. 30, 1913.

[H. P. Gabel and P. M. Clemens, observers.]

Day.	Oct.	Nov.	Dec.	Jan.	Apr.	May.	June.	July.	Aug.	Sept.
1.....	1.65	1.65	2.40			4.18	7.18	5.25	3.10	2.14
2.....	1.65	1.65	2.35	1.98		4.20	7.30	5.15		2.14
3.....	1.65	1.60	2.40	1.95		4.20	7.40	5.08		2.12
4.....	1.60	1.60	2.50	1.98		4.18	7.42		2.95	
5.....	1.60	1.60	2.40	1.95		4.15	7.42	4.95	2.90	
6.....	1.60	1.60	2.40	1.95		4.15	7.42	4.80	2.90	
7.....	1.60	1.65	2.30			4.20	7.30	4.72	2.90	
8.....	1.60	1.70	2.30	1.95		4.30	7.40	4.68	2.30	2.14
9.....	1.60	1.70	2.25			4.50	7.40	4.55	2.75	2.15
10.....	1.60	1.90	2.25			4.75	7.38	4.45	2.72	2.12
11.....	1.60	2.00	2.20			4.92	7.30		2.70	2.11
12.....	1.55	2.10	2.20			5.10	7.15	4.35	2.60	2.09
13.....	1.55	2.20	2.20			5.22	7.08	4.22	2.50	2.04
14.....	1.55	2.30	2.20			5.32	6.92	4.20	2.55	2.04
15.....	1.55	2.40	2.20			5.42	6.80	4.10	2.55	2.04
16.....	1.50	2.40	2.20			5.42	6.65	4.02	2.54	2.02
17.....	1.50	2.50	2.20			5.40	6.50	4.00	2.57	2.01
18.....	1.50	2.60	2.20		3.02	5.48	6.32	3.85	2.46	2.03
19.....	1.55	2.60	2.20		3.22	5.48	6.28	3.80	2.48	1.98
20.....	1.55	2.50	2.20		3.35	5.45	6.10	3.75	2.45	1.96
21.....	1.55	2.50	2.20		3.42	5.50	6.08	3.75	2.45	1.96
22.....	1.60	2.50	2.20		3.58	5.50		3.65	2.38	1.99
23.....	1.80	2.50			3.65	5.62	5.90	3.60	2.31	1.96
24.....	1.65	2.50				5.75	5.82	3.65	2.31	2.03
25.....	1.65	2.50	2.10			5.92	5.75	3.50	2.30	2.04
26.....	1.70	2.50				6.10	5.60	3.45	2.30	2.02
27.....	1.70	2.50				6.42	5.50	3.35	2.27	2.00
28.....	1.70	2.50				6.60	5.42	3.30	2.21	2.00
29.....	1.70	2.40	2.00				5.48	3.25	2.20	2.00
30.....	1.70	2.40	2.00			6.90	5.44	3.25	2.17	1.95
31.....	1.70		2.00			7.02		3.20	2.21	

NOTE.—Second gage broken by ice, Feb. 14; inclined staff gage installed, Apr. 18.

Observer reported gage heights subject to error on account of wind, as follows: Sept. 8, wind from southwest; raising water; Sept. 9, wind from north; raising water; Sept. 13, wind from south; lowering water; Sept. 18, strong wind from north; raising water. Effect probable on other days but not reported.

Daily discharge, in second-feet, of Priest River at outlet of Priest Lake, at Coolin, Idaho, for the years ending Sept. 30, 1912 and 1913.

Day.	July.	Aug.	Sept.	Day.	July.	Aug.	Sept.	Day.	July.	Aug.	Sept.
1912.				1912.				1912.			
1.....		1,080	575	11.....		900	695	21.....	1,330	695	605
2.....		1,040	575	12.....		865	665	22.....	1,250	665	575
3.....		1,000	605	13.....	1,570	830	665	23.....	1,250	635	575
4.....		1,000	635	14.....	1,570	830	665	24.....	1,250	635	575
5.....		970	605	15.....	1,490	795	635	25.....	1,190	605	575
6.....		970	575	16.....	1,490	760	635	26.....	1,180	575	520
7.....		970	575	17.....	1,410	760	635	27.....	1,110	575	520
8.....		970	635	18.....	1,410	760	635	28.....	1,110	575	520
9.....		935	665	19.....	1,410	728	635	29.....	1,110	548	520
10.....		900	695	20.....	1,410	695	605	30.....	1,110	548	520
								31.....	1,080	548	



*Daily discharge, in second-feet, of Priest River at outlet of Priest Lake, at Coolin, Idaho, for the years ending Sept. 30, 1912 and 1913—Continued.*

Day.	Oct.	Nov.	Dec.	Jan.	Apr.	May.	June.	July.	Aug.	Sept.
<b>1912-13.</b>										
1.....	495	495	970	689	.....	2,120	5,650	3,230	1,210	562
2.....	495	495	935	683	.....	2,140	5,810	3,120	1,180	562
3.....	495	470	970	683	.....	2,140	5,940	3,040	1,140	551
4.....	470	470	1,040	665	.....	2,120	5,970	2,970	1,100	553
5.....	470	470	970	665	.....	2,100	5,970	2,900	1,060	535
6.....	470	470	970	665	.....	2,100	5,970	2,730	1,060	557
7.....	470	495	900	665	.....	2,140	5,810	2,650	1,060	559
8.....	470	520	900	665	.....	2,230	5,940	2,610	985	562
9.....	470	520	865	.....	.....	2,430	5,940	2,480	950	568
10.....	470	635	865	.....	.....	2,680	5,910	2,380	925	551
11.....	470	695	830	.....	.....	2,860	5,810	2,330	910	546
12.....	448	760	830	.....	.....	3,060	5,620	2,280	845	534
13.....	448	830	830	.....	.....	3,190	5,520	2,160	780	507
14.....	448	900	830	.....	.....	3,300	5,320	2,140	812	507
15.....	448	970	830	.....	.....	3,410	5,160	2,050	812	507
16.....	425	970	830	.....	.....	3,410	4,960	1,980	806	496
17.....	425	1,040	830	.....	.....	3,390	4,770	1,960	826	490
18.....	425	1,110	830	.....	1,150	3,490	4,540	1,820	754	502
19.....	448	1,110	830	.....	1,300	3,490	4,480	1,780	767	474
20.....	448	1,040	830	.....	1,400	3,450	4,250	1,740	748	463
21.....	418	1,040	830	.....	1,460	3,510	4,220	1,740	748	463
22.....	470	1,040	830	.....	1,580	3,510	4,100	1,640	703	480
23.....	470	1,040	807	.....	1,640	3,650	3,990	1,600	661	463
24.....	495	1,040	783	.....	.....	3,810	3,890	1,560	661	502
25.....	495	1,040	760	.....	.....	4,020	3,810	1,520	655	507
26.....	520	1,040	744	.....	.....	4,250	3,630	1,480	655	496
27.....	520	1,040	727	.....	.....	4,670	3,510	1,400	637	485
28.....	520	1,040	711	.....	.....	4,900	3,410	1,360	601	485
29.....	520	970	695	.....	.....	5,100	3,490	1,320	595	485
30.....	520	970	695	.....	.....	5,290	3,440	1,320	578	458
31.....	520	.....	695	.....	.....	5,450	.....	1,280	601	.....

NOTE.—Discharge determined from two rating curves: First curve poorly defined, based on one discharge measurement made Dec. 25, 1912, and form of curve established by 6 discharge measurements made in 1913 and 1914, used July 13, 1912, to Jan. 8, 1913; second curve, fairly well defined between 500 and 5,000 second-feet, used Apr. 18 to Sept. 30, 1913. Discharge interpolated for periods for which gage heights are not recorded, Oct. 1 to Jan. 8 and May 1 to Sept. 30.

*Monthly discharge of Priest River at outlet of Priest Lake, at Coolin, Idaho, for the years ending Sept. 30, 1912 and 1913.*

[Drainage area, 572 square miles.]

Month.	Discharge in second-feet.				Run-off.		Accuracy.
	Maximum.	Minimum.	Mean.	Per square mile.	Depth in inches on drainage area.	Total in acre-feet.	
1912.							
July 13-31.....	1,570	1,080	1,300	2.27	1.80	49,000	C.
August.....	1,080	548	786	1.37	1.58	48,300	C.
September.....	695	520	604	1.06	1.18	35,900	C.
1912-13.							
October.....	520	425	474	0.829	0.96	29,100	C.
November.....	1,110	470	824	1.44	1.61	49,000	C.
December.....	1,040	695	837	1.46	1.68	51,500	C.
May.....	5,450	2,100	3,340	5.84	6.73	205,000	B.
June.....	5,970	3,410	4,890	8.55	9.54	291,000	B.
July.....	3,220	1,280	2,080	3.64	4.20	128,000	B.
August.....	1,210	578	833	1.46	1.68	51,200	B.
September.....	568	458	514	0.899	1.00	30,600	B.

Source: [http://waterdata.usgs.gov/nwis/wys\\_rpt/?site\\_no=12393000&agency\\_cd=USGS](http://waterdata.usgs.gov/nwis/wys_rpt/?site_no=12393000&agency_cd=USGS)

### **12393000 PRIEST LAKE AT OUTLET NEAR COOLIN, ID**

LOCATION - Lat 48°30'27", long 116°53'13" referenced to North American Datum of 1983, in NW 1/4 NE 1/4 SW 1/4 sec.32, T.60 N., R.4 W., Bonner County, ID, Hydrologic Unit 17010215, Priest Lake SW quad., 0.9 mi east of outlet, 2.6 mi northwest of Coolin, and 44 mi upstream from mouth of Priest River.

DRAINAGE AREA - 572 mi<sup>2</sup>.

### **SURFACE-WATER RECORDS**

PERIOD OF RECORD - June 1911 to September 1913 (fragmentary gage-height records at Coolin, published as part of records for "Priest River at outlet of Priest Lake, at Coolin"), April 1928 to July 1950 (gage-height record only), August 1950 to current year.

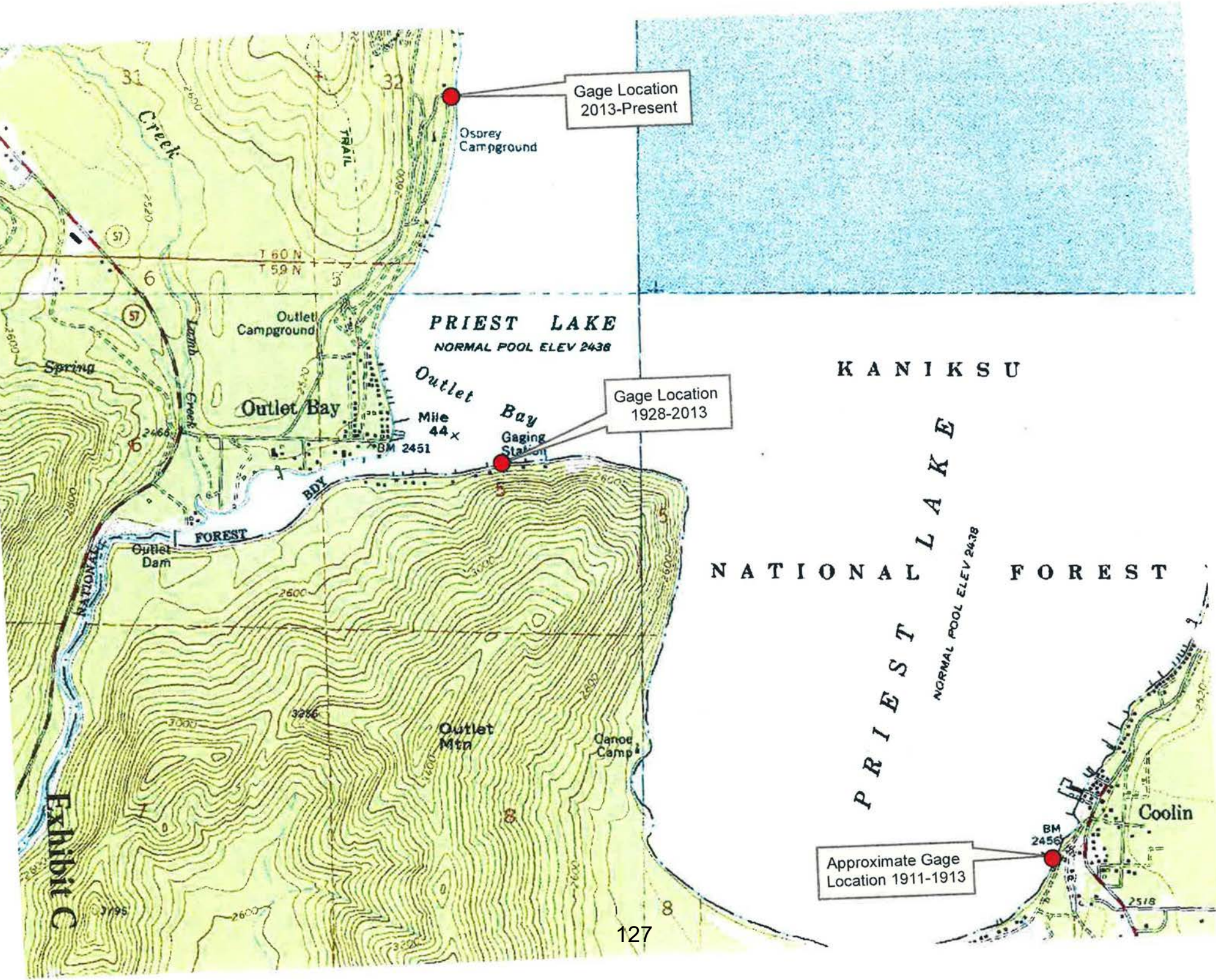
GAGE - Water-stage recorder. Datum of gage is 2,434.64 ft above NGVD of 1929. June 18, 1911 to Sept. 30, 1913, non recording gages at Coolin at different datums. Apr. 21, 1928 to Oct. 18, 1939, non recording gage at site 400 ft north of lake outlet at present datum.

REMARKS - Flow from Priest Lake is regulated to hold lake at levels desirable for recreation interests during summer months and storage is released for power use downstream during winter months. Storage began Aug. 9, 1950. Prior to Aug. 9, 1950, some regulation resulted from logging operations in the outlet channel. Figures given herein represent contents above gage height of about -2 ft. New dam completed Nov. 27, 1978.

- Water Year 2014: Records good.

EXTREMES FOR PERIOD OF RECORD - Maximum gage height, 6.68 ft, June 20, 1974, contents, 207,500 acre-ft; minimum, -0.46 ft Jan. 5, 6, 1977, Feb. 26, Mar. 2, 2001, contents, 37,500 acre-ft.





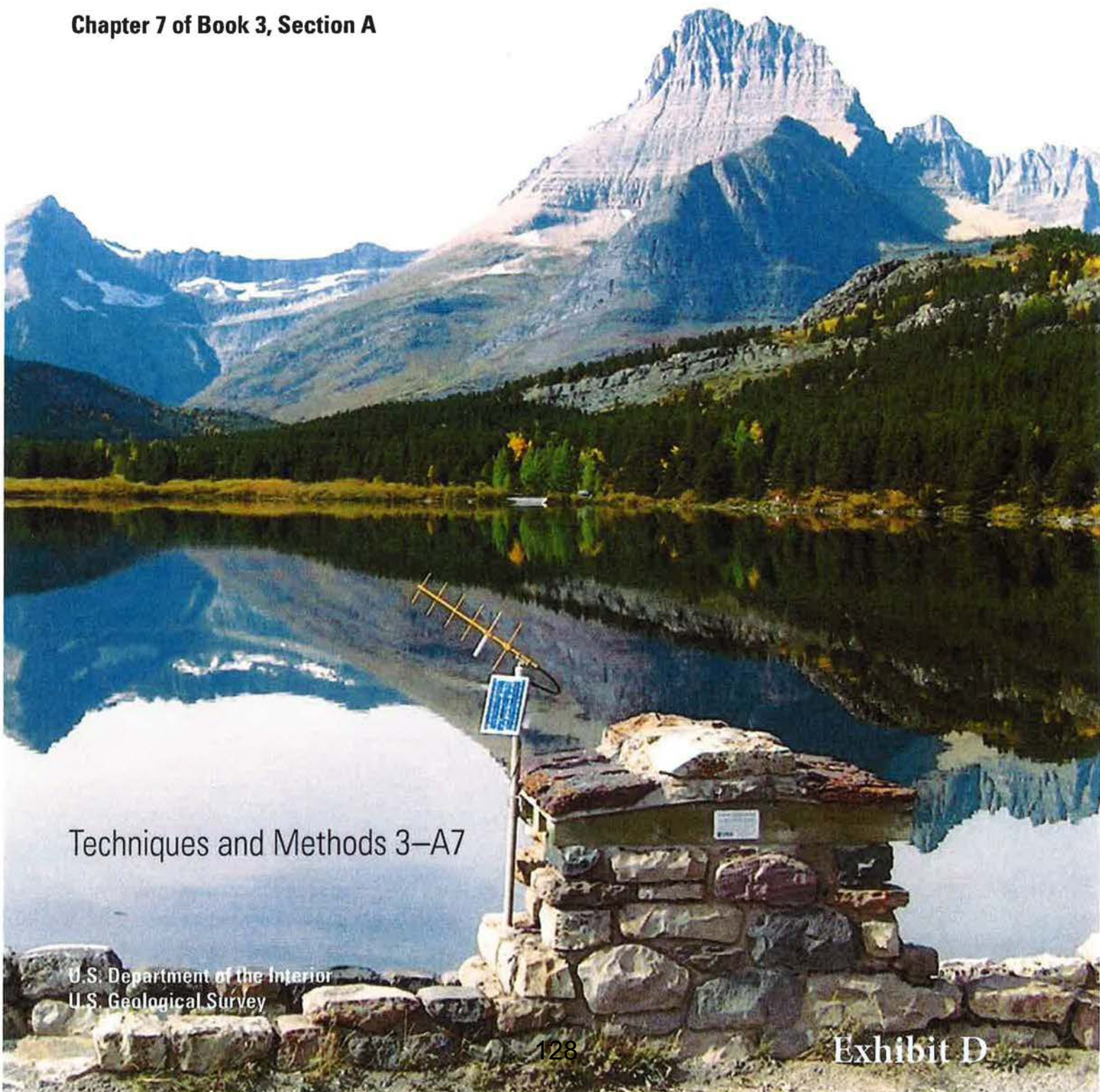


# Stage Measurement at Gaging Stations

Chapter 7 of Book 3, Section A

Techniques and Methods 3–A7

U.S. Department of the Interior  
U.S. Geological Survey





# **Stage Measurement at Gaging Stations**

By Vernon B. Sauer and D. Phil Turnipseed

Techniques and Methods 3–A7

**U.S. Department of the Interior  
U.S. Geological Survey**

**U.S. Department of the Interior**  
KEN SALAZAR, Secretary

**U.S. Geological Survey**  
Marcia K. McNutt, Director

U.S. Geological Survey, Reston, Virginia: 2010

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## Preface

This series of manuals on Techniques and Methods (TM) describes approved scientific and data-collection procedures and standard methods for planning and executing studies and laboratory analyses. The material is grouped under major subject headings called “books” and further subdivided into sections and chapters. Section A of book 3 is on surface-water techniques.

The unit of publication, the chapter, is limited to a narrow field of subject matter. These publications are subject to revision because of experience in use or because of advancement in knowledge, techniques, or equipment, and this format permits flexibility in revision and publication as the need arises. Chapter A7 of book 3 (TM 3–A7) deals with stage measurement at gaging stations. The original version of this chapter was published in 1968 as U.S. Geological Survey (USGS) Techniques for Water-Resources Investigations, chapter A7 of book 3. New and improved equipment, as well as some procedural changes, have resulted in this revised second edition of “Stage measurement at gaging stations.”

This edition supersedes USGS Techniques of Water-Resources Investigations 3A–7, 1968, “Stage measurement at gaging stations,” by T.J. Buchanan and W.P. Somers, available at <http://pubs.usgs.gov/twri/twri3a7/>, and supplements USGS Water-Supply Paper 2175, volume 1, 1982, “Measurement and computation of streamflow: Measurement of stage and discharge,” by S.E. Rantz and others, available at [http://pubs.usgs.gov/wsp/wsp2175/html/WSP2175\\_vol1.html](http://pubs.usgs.gov/wsp/wsp2175/html/WSP2175_vol1.html).

This revised second edition of “Stage measurement at gaging stations” is published online at <http://pubs.usgs.gov/tm/tm3-a7/> and is for sale by the U.S. Geological Survey, Science Information Delivery, Box 25286, Federal Center, Denver, CO 80225.

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## Conversion Factors

Multiply	By	To obtain
Length		
inch (in.)	2.54	centimeter (cm)
foot (ft)	0.3048	meter (m)
mile (mi)	1.609	kilometer (km)
Pressure		
pound per square inch (lb/in <sup>2</sup> )	6.895	kilopascal (kPa)
ounce force per square inch (ozf/in <sup>2</sup> )	110.316	kilopascal (kPa)
pound force per square foot (lb/ft <sup>2</sup> )	0.0479	kilopascal (kPa)
Density		
pound per cubic foot (lb/ft <sup>3</sup> )	16.02	kilogram per cubic meter (kg/m <sup>3</sup> )

Temperature in degrees Celsius (°C) may be converted to degrees Fahrenheit (°F) as follows:

$$^{\circ}\text{F}=(1.8\times^{\circ}\text{C})+32$$

Temperature in degrees Fahrenheit (°F) may be converted to degrees Celsius (°C) as follows:

$$^{\circ}\text{C}=(^{\circ}\text{F}-32)/1.8$$

Vertical coordinate information is referenced to the "National Geodetic Vertical Datum of 1929 (NGVD 29)" or the "North American Vertical Datum of 1988 (NAVD 88)."



## Gage Datum

The datum of the gage may be either a recognized datum, such as the North American Vertical Datum of 1988 (NAVD 88), the National Geodetic Vertical Datum of 1929 (NGVD 29), or an arbitrary datum chosen for convenience. NGVD 29 was the predominant datum used to establish lake and reservoir gages, and streamflow gages, including those located in tidal zones or coastal areas; however, with its inception, the NAVD 88 is currently the datum the USGS recommends as the vertical datum for the USGS streamgaging network. Where NAVD 88 exists, all gages referenced to other datums should be resurveyed or converted to NAVD 88. An arbitrary datum plane is usually used for streamgaging sites where it is desirable for all recorded gage heights to be relatively low numbers.

Select the arbitrary datum plane for a streamgaging site to avoid negative values of gage height. This requires the arbitrary datum plane to be below the lowest expected gage height, which will be at, or below, the elevation of zero flow on the control for all conditions.

Maintain a permanent gage datum, if at all possible, so that only one datum for the gage-height record is used for the life of the gaging station. For each gaging station, maintain a permanent datum that has at least three permanent reference marks that are independent of the gage structure. For gaging stations located at bridges, use at least one reference mark that is located away from the bridge structure, preferably out of the right-of-way easement. To make sure that the reference gage and the auxiliary gages have not changed relative to the established datum, and to determine the magnitude of any changes, run levels periodically to all gages and reference marks. Procedures for running levels at gaging stations are historically described by Thomas and Jackson (1981) and Kennedy (1990). With the publication of Kenney (2010), this is the standard for differential level surveys at USGS streamgaging stations.

The gage datum may need to be changed if there is excessive channel scour or a manmade channel change. Make such a change in increments of whole feet (or meters) so that the new datum can easily relate to the old datum. In some instances, the gage itself may need to be relocated to another site. The relation between the datum for the new gage site and the datum for the old gage site should be defined by leveling; however, it is not usually necessary to use the same datum at both sites. Keep a permanent record, or history, of all datum changes.

If you use an arbitrary datum plane for a gaging station, establish its relation to NAVD 88 by levels in order to maintain a national datum for the gage-height record. This can be done by using a Global Positioning System (GPS) survey, if it is not practical to do a level survey from a known established bench mark. This allows for recovery of the gage datum if the gage and local reference marks are destroyed.

## Stage-Accuracy Requirements

Stage and elevation data are used primarily as an index for computing stream discharge and reservoir contents. The established methods require that stage data be measured and stored as instantaneous values rather than averaged values. Subsequent data processing and analysis will provide the means for any required averaging. The following paragraphs on accuracy requirements and stage-measurement error pertain to instantaneous stage values.

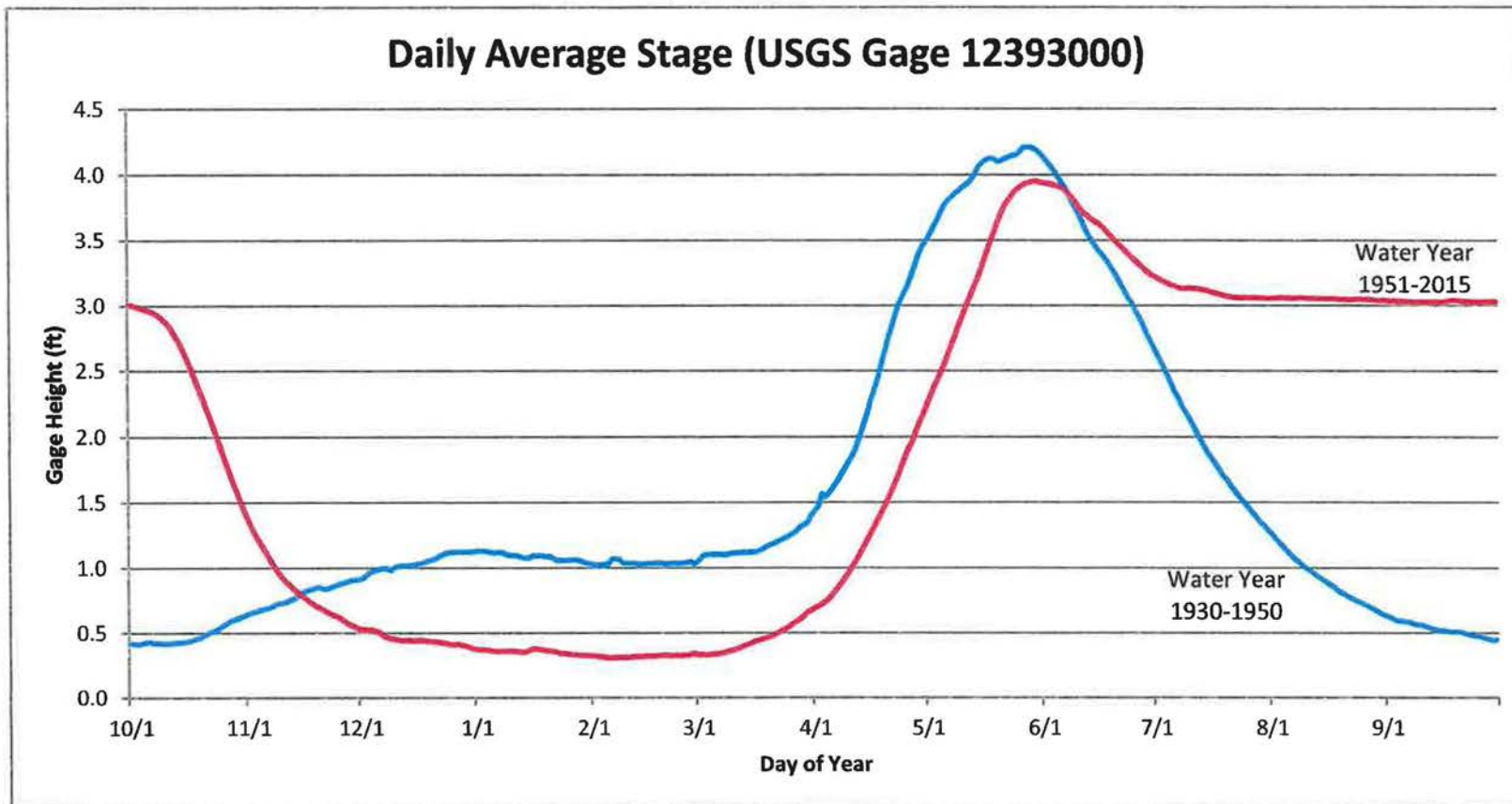
A number of factors enter into the specification of stage-accuracy requirements. For instance, the specific use for which the stage data are collected is an important factor. Stage data used to compute streamflow records must be significantly more accurate than stage data used for some design applications, or for certain flood-plain management applications. The primary use of stage data by the USGS is for computation of streamflow records; consequently, stage-accuracy requirements are stringent. In accordance with this primary use, and because the use of stage data cannot be predicted, the overall accuracy of stage data established for USGS gaging stations is either 0.01 foot or 0.2 percent of the effective stage, whichever is greater. For example, the required accuracy would be 0.06 ft at an effective stage of 30 ft, 0.02 ft at 10 ft, and 0.01 ft at all effective stages less than 7.5 ft. Effective stage is defined as the height of the water surface above the orifice, intake, or other point of exposure of the sensor to the water body. The instrument should be installed in the field with the orifice or intake only slightly below the zero-flow stage, or other defined low point of use.

The accuracy criteria stated above applies to the complete streamgaging station configuration, and is a composite of errors, or total error, from all of the components necessary for sensing, recording, and retrieving the data. See USGS Office of Surface Water (OSW) Technical Memorandum No. 93.07 (1992) and OSW Technical Memorandum 96.05 (1996a). The individual sources of stage-measurement errors are described in the next section of this report.

The same accuracy requirements apply at reservoirs, lakes, and estuaries as those for stream sites. Vertical accuracy is needed for the computation of storage changes in reservoirs, for computation of discharge using slope ratings and (or) unsteady-flow models.

When field conditions, such as high velocities, wave action, or channel instability, make it impossible to collect accurate stage data or to define an accurate stage-discharge relation, stage data should be collected with the greatest accuracy feasible. Select appropriate instruments and methods to fit the field conditions.





<b>Day of Year</b>	<b>Water Year 1930-1950 Average Daily Stage (feet)</b>	<b>Water Year 1951-2015 Average Daily Stage (feet)</b>
10/1	0.42	3.00
10/2	0.41	3.00
10/3	0.41	2.99
10/4	0.42	2.98
10/5	0.43	2.97
10/6	0.43	2.96
10/7	0.42	2.95
10/8	0.42	2.93
10/9	0.42	2.91
10/10	0.42	2.88
10/11	0.42	2.86
10/12	0.42	2.81
10/13	0.43	2.76
10/14	0.43	2.71
10/15	0.43	2.65
10/16	0.44	2.59
10/17	0.44	2.52
10/18	0.45	2.45
10/19	0.46	2.37
10/20	0.48	2.30
10/21	0.49	2.22
10/22	0.51	2.15
10/23	0.51	2.07
10/24	0.53	1.99
10/25	0.55	1.91
10/26	0.57	1.82
10/27	0.59	1.74
10/28	0.60	1.66
10/29	0.61	1.58
10/30	0.62	1.51
10/31	0.63	1.43
11/1	0.64	1.37
11/2	0.66	1.31
11/3	0.67	1.25
11/4	0.67	1.20
11/5	0.68	1.15
11/6	0.69	1.11
11/7	0.70	1.06
11/8	0.71	1.01
11/9	0.72	0.97

<b>Day of Year</b>	<b>Water Year 1930-1950 Average Daily Stage (feet)</b>	<b>Water Year 1951-2015 Average Daily Stage (feet)</b>
11/10	0.73	0.93
11/11	0.73	0.89
11/12	0.75	0.87
11/13	0.76	0.84
11/14	0.78	0.82
11/15	0.80	0.79
11/16	0.82	0.77
11/17	0.83	0.75
11/18	0.84	0.72
11/19	0.85	0.71
11/20	0.85	0.69
11/21	0.84	0.67
11/22	0.84	0.66
11/23	0.85	0.64
11/24	0.86	0.63
11/25	0.87	0.62
11/26	0.88	0.60
11/27	0.89	0.58
11/28	0.90	0.56
11/29	0.91	0.55
11/30	0.91	0.54
12/1	0.92	0.53
12/2	0.93	0.53
12/3	0.96	0.52
12/4	0.97	0.52
12/5	0.98	0.51
12/6	0.99	0.50
12/7	1.00	0.48
12/8	0.99	0.47
12/9	0.98	0.46
12/10	1.00	0.45
12/11	1.01	0.45
12/12	1.02	0.44
12/13	1.02	0.44
12/14	1.02	0.44
12/15	1.02	0.44
12/16	1.03	0.44
12/17	1.03	0.44
12/18	1.04	0.44
12/19	1.05	0.44

<b>Day of Year</b>	<b>Water Year 1930-1950 Average Daily Stage (feet)</b>	<b>Water Year 1951-2015 Average Daily Stage (feet)</b>
12/20	1.06	0.43
12/21	1.07	0.43
12/22	1.09	0.43
12/23	1.10	0.42
12/24	1.12	0.42
12/25	1.12	0.41
12/26	1.12	0.41
12/27	1.12	0.41
12/28	1.12	0.40
12/29	1.12	0.40
12/30	1.12	0.39
12/31	1.12	0.38
1/1	1.13	0.37
1/2	1.13	0.37
1/3	1.13	0.37
1/4	1.12	0.36
1/5	1.12	0.36
1/6	1.11	0.36
1/7	1.12	0.36
1/8	1.11	0.36
1/9	1.10	0.36
1/10	1.10	0.36
1/11	1.09	0.36
1/12	1.09	0.35
1/13	1.08	0.35
1/14	1.08	0.35
1/15	1.08	0.36
1/16	1.09	0.38
1/17	1.09	0.37
1/18	1.09	0.37
1/19	1.09	0.36
1/20	1.09	0.36
1/21	1.08	0.36
1/22	1.06	0.35
1/23	1.06	0.34
1/24	1.06	0.34
1/25	1.06	0.34
1/26	1.06	0.33
1/27	1.06	0.33
1/28	1.06	0.33



<b>Day of Year</b>	<b>Water Year 1930-1950 Average Daily Stage (feet)</b>	<b>Water Year 1951-2015 Average Daily Stage (feet)</b>
1/29	1.05	0.33
1/30	1.04	0.33
1/31	1.03	0.32
2/1	1.03	0.32
2/2	1.02	0.32
2/3	1.02	0.31
2/4	1.03	0.31
2/5	1.03	0.31
2/6	1.07	0.30
2/7	1.07	0.31
2/8	1.07	0.31
2/9	1.03	0.31
2/10	1.03	0.31
2/11	1.03	0.31
2/12	1.03	0.32
2/13	1.03	0.31
2/14	1.03	0.32
2/15	1.03	0.32
2/16	1.04	0.32
2/17	1.03	0.32
2/18	1.04	0.32
2/19	1.04	0.32
2/20	1.03	0.33
2/21	1.03	0.33
2/22	1.04	0.32
2/23	1.04	0.33
2/24	1.03	0.32
2/25	1.03	0.33
2/26	1.04	0.33
2/27	1.05	0.34
2/28	1.03	0.34
3/1	1.05	0.32
3/2	1.08	0.33
3/3	1.10	0.33
3/4	1.10	0.33
3/5	1.10	0.34
3/6	1.10	0.34
3/7	1.10	0.34
3/8	1.10	0.35
3/9	1.10	0.36

<b>Day of Year</b>	<b>Water Year 1930-1950 Average Daily Stage (feet)</b>	<b>Water Year 1951-2015 Average Daily Stage (feet)</b>
3/10	1.11	0.36
3/11	1.11	0.37
3/12	1.11	0.38
3/13	1.12	0.40
3/14	1.12	0.41
3/15	1.12	0.42
3/16	1.12	0.44
3/17	1.13	0.44
3/18	1.14	0.45
3/19	1.16	0.46
3/20	1.17	0.47
3/21	1.18	0.48
3/22	1.20	0.50
3/23	1.21	0.52
3/24	1.23	0.53
3/25	1.24	0.55
3/26	1.26	0.57
3/27	1.28	0.59
3/28	1.31	0.60
3/29	1.33	0.63
3/30	1.34	0.66
3/31	1.40	0.67
4/1	1.43	0.69
4/2	1.47	0.70
4/3	1.56	0.72
4/4	1.54	0.74
4/5	1.58	0.77
4/6	1.62	0.81
4/7	1.66	0.84
4/8	1.71	0.88
4/9	1.76	0.92
4/10	1.81	0.97
4/11	1.85	1.01
4/12	1.91	1.06
4/13	1.99	1.11
4/14	2.08	1.16
4/15	2.17	1.22
4/16	2.27	1.27
4/17	2.36	1.33
4/18	2.45	1.38

<b>Day of Year</b>	<b>Water Year 1930-1950 Average Daily Stage (feet)</b>	<b>Water Year 1951-2015 Average Daily Stage (feet)</b>
4/19	2.56	1.44
4/20	2.66	1.49
4/21	2.78	1.56
4/22	2.86	1.62
4/23	2.96	1.69
4/24	3.04	1.77
4/25	3.10	1.84
4/26	3.15	1.91
4/27	3.23	1.96
4/28	3.31	2.04
4/29	3.40	2.11
4/30	3.46	2.17
5/1	3.50	2.24
5/2	3.55	2.31
5/3	3.61	2.38
5/4	3.66	2.44
5/5	3.72	2.50
5/6	3.78	2.57
5/7	3.81	2.65
5/8	3.84	2.73
5/9	3.87	2.80
5/10	3.89	2.88
5/11	3.91	2.95
5/12	3.93	3.02
5/13	3.96	3.10
5/14	4.00	3.17
5/15	4.06	3.24
5/16	4.09	3.31
5/17	4.12	3.40
5/18	4.13	3.48
5/19	4.13	3.56
5/20	4.11	3.64
5/21	4.11	3.70
5/22	4.12	3.77
5/23	4.13	3.81
5/24	4.15	3.85
5/25	4.15	3.89
5/26	4.17	3.90
5/27	4.21	3.93
5/28	4.21	3.94

<b>Day of Year</b>	<b>Water Year 1930-1950 Average Daily Stage (feet)</b>	<b>Water Year 1951-2015 Average Daily Stage (feet)</b>
5/29	4.21	3.95
5/30	4.20	3.95
5/31	4.18	3.95
6/1	4.15	3.94
6/2	4.11	3.94
6/3	4.08	3.93
6/4	4.05	3.92
6/5	4.00	3.91
6/6	3.95	3.91
6/7	3.91	3.89
6/8	3.85	3.86
6/9	3.80	3.82
6/10	3.75	3.79
6/11	3.69	3.75
6/12	3.62	3.71
6/13	3.56	3.69
6/14	3.51	3.66
6/15	3.47	3.64
6/16	3.43	3.63
6/17	3.39	3.60
6/18	3.35	3.57
6/19	3.31	3.54
6/20	3.27	3.51
6/21	3.22	3.48
6/22	3.16	3.45
6/23	3.11	3.42
6/24	3.06	3.39
6/25	3.02	3.36
6/26	2.95	3.34
6/27	2.90	3.31
6/28	2.84	3.29
6/29	2.77	3.26
6/30	2.71	3.24
7/1	2.66	3.22
7/2	2.60	3.21
7/3	2.54	3.19
7/4	2.49	3.18
7/5	2.42	3.16
7/6	2.35	3.15
7/7	2.30	3.14



<b>Day of Year</b>	<b>Water Year 1930-1950 Average Daily Stage (feet)</b>	<b>Water Year 1951-2015 Average Daily Stage (feet)</b>
7/8	2.25	3.13
7/9	2.20	3.13
7/10	2.15	3.13
7/11	2.09	3.13
7/12	2.04	3.13
7/13	1.98	3.13
7/14	1.93	3.12
7/15	1.88	3.11
7/16	1.84	3.10
7/17	1.80	3.10
7/18	1.75	3.09
7/19	1.71	3.08
7/20	1.68	3.07
7/21	1.63	3.07
7/22	1.59	3.06
7/23	1.56	3.06
7/24	1.52	3.06
7/25	1.49	3.06
7/26	1.45	3.06
7/27	1.42	3.06
7/28	1.38	3.06
7/29	1.35	3.06
7/30	1.33	3.05
7/31	1.29	3.05
8/1	1.26	3.05
8/2	1.23	3.05
8/3	1.19	3.06
8/4	1.16	3.06
8/5	1.14	3.06
8/6	1.10	3.06
8/7	1.07	3.05
8/8	1.05	3.06
8/9	1.03	3.06
8/10	1.00	3.06
8/11	0.98	3.05
8/12	0.96	3.05
8/13	0.94	3.05
8/14	0.92	3.05
8/15	0.90	3.05
8/16	0.88	3.05

<b>Day of Year</b>	<b>Water Year 1930-1950 Average Daily Stage (feet)</b>	<b>Water Year 1951-2015 Average Daily Stage (feet)</b>
8/17	0.86	3.05
8/18	0.85	3.05
8/19	0.82	3.05
8/20	0.81	3.05
8/21	0.79	3.05
8/22	0.77	3.04
8/23	0.76	3.04
8/24	0.74	3.05
8/25	0.73	3.05
8/26	0.72	3.04
8/27	0.70	3.04
8/28	0.69	3.04
8/29	0.67	3.04
8/30	0.66	3.03
8/31	0.64	3.04
9/1	0.63	3.03
9/2	0.62	3.03
9/3	0.60	3.03
9/4	0.59	3.03
9/5	0.59	3.03
9/6	0.59	3.03
9/7	0.58	3.03
9/8	0.57	3.02
9/9	0.56	3.02
9/10	0.56	3.03
9/11	0.55	3.03
9/12	0.54	3.03
9/13	0.53	3.02
9/14	0.52	3.02
9/15	0.52	3.02
9/16	0.52	3.02
9/17	0.51	3.03
9/18	0.51	3.04
9/19	0.51	3.04
9/20	0.51	3.04
9/21	0.50	3.03
9/22	0.49	3.03
9/23	0.48	3.03
9/24	0.48	3.03
9/25	0.47	3.02

<b>Day of Year</b>	<b>Water Year 1930-1950 Average Daily Stage (feet)</b>	<b>Water Year 1951-2015 Average Daily Stage (feet)</b>
9/26	0.47	3.02
9/27	0.46	3.02
9/28	0.45	3.03
9/29	0.44	3.03
9/30	0.45	3.03

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

NO. CV-15-1075

Plaintiffs,

VS.

PHILIP HUDSON,

Defendant.

**MEMORANDUM IN OPPOSITION  
TO THE STATE OF IDAHO'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT RE: FIRST CLAIM FOR  
RELIEF**

PHILIP HUDSON,

Counterclaim Plaintiff,

VS.

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS.

### Counterclaim Defendants.



COMES NOW Defendant/Counterclaim Plaintiff Philip Hudson, by and through his attorney of record, John F. Magnuson, and respectfully submits this Memorandum in opposition to the “Motion for Partial Summary Judgment” filed by the State of Idaho as to its First Claim for Relief. This Memorandum is supported by the pleadings and submissions on file herein, including the following Declarations filed herewith:

- (1) Declaration of Ernest M. Warner, PLS;
- (2) Declaration of Philip Hudson; and
- (3) Declaration of Drew C. Dittman, P.E.

In addition, this Memorandum is supported by the submissions previously filed by the State of Idaho in support of its Motion, including the Affidavits of Mick Schanilec and Matthew Anders.

## **I. INTRODUCTION.**

The State of Idaho owns in trust for the public title to the beds of navigable lakes below the Ordinary High Water Mark (OHWM) as it existed at the time Idaho was admitted into the Union (July 3, 1890). State v. Erickson, 132 Idaho 208, 210, 970 P.2d 1 (1998) (citing Heckman Ranches, Inc. v. State, 99 Idaho 793, 796, 589 P.2d 540, 543 (1979)). The State of Idaho has brought suit against Defendant Hudson. Defendant Hudson owns littoral property on Priest Lake. Hudson placed certain natural improvements on his property, located at elevations between 2435 feet and 2437.64 feet. Since approximately 1951, the level of Priest Lake has been maintained through the summer growing season at elevation 2437.64 feet. The State contends that the summer level of Priest Lake, as maintained during the growing season for the past sixty-five (65) years, constitutes the OHWM. Hudson contends that there are material issues of fact as to the location of the OHWM as of July 3,

1890, and that the level created by the dam, during the summer growing season, is higher than the level that would otherwise have normally and ordinarily occurred at Statehood. Accordingly, Hudson asserts that there are material issues of fact as to whether or not the encroachments at issue are located on his property or on property of the State.

## **II. PROCEDURAL BACKGROUND.**

On July 13, 2015, the State filed its Verified Complaint. The Complaint asserted two (2) causes of action: (1) violation of the Lake Protection Act (I.C. §§ 58-1301 and 1303); and (2) trespass on State lands (in violation of I.C. §§ 58-312), coupled with a claim for injunctive and monetary relief. The State now moves for partial summary judgment on its first claim for relief (violation of the Lake Protection Act). Hudson has answered and counterclaimed, denying liability.

## **III. STATEMENT OF FACTS.**

1. The State of Idaho owns in trust for the public title to the bed of navigable waters below the Ordinary High Water Mark (OHWM) as it existed at the time Idaho was admitted into the Union (July 3, 1890). See, e.g., Erickson v. State, 132 Idaho 208, 210 (1998).

2. A dam was constructed by the State of Idaho, at the outlet of Priest Lake, in approximately 1950. See Affidavit of Matthew Anders at ¶ 11. The dam was first used for water storage purposes on August 9, 1950. Id.

3. Dams do not lower the level of a given waterway. In Re Sanders Beach, 143 Idaho 443, 450, 147 P.3d 75 (2006). Dams increase the elevation of the level of a given waterway. Id. In other words, the OHWM of a given waterway (determined as of the date of Statehood) is not higher before a dam was constructed than it was afterwards. Id.

4. The dam constructed at the outlet of Priest Lake, subsequently utilized for water impoundment purposes, has been used to maintain the level of Priest Lake at an elevation of 2437.64 feet msl (NGVD 1929) as measured on the outlet gauge, in July, August, and September, on an annual basis, since 1951. See Affidavit of Matthew Anders at ¶ 19.

5. In simple terms, since the dam became fully operational in 1951, water has been impounded in Priest Lake every year, for the months of July through September, at an elevation of 2437.64 feet. Prior to construction of the dam, the level of Priest Lake naturally receded below 2437.64 feet during the months of July, August, and September. See Declaration of Ernest M. Warner at ¶ 13.

6. Prior to the initiation of operations of the dam at the outlet of Priest Lake, the elevation of Priest Lake annually fell to 2435.64 feet by approximately August 1 of each year (or two (2) vertical feet lower than the level maintained by the dam). See Warner Declaration at Ex. A. By September 1 of each year, prior to the initiation of dam operations, the level of Priest Lake fell to approximately 2435.1 feet by September 1. Id.

7. Vegetation grows in Idaho throughout the month of August of each calendar year.

8. The OHWM of Priest Lake, at Statehood, is “the line which the water impress(d) on the soil by covering it for sufficient periods to deprive the soil of its Vegetation and destroy its value for agricultural purposes.” See In Re Sanders Beach, 143 Idaho at 446 (citing I.C. § 58-104(9)).

9. It therefore naturally flows that prior to the operation of the dam at the outlet of Priest Lake, the level of the Lake fell at least two (2) vertical feet, on an annual basis, below the level maintained after the dam became operational (2437.64 feet). Since the adjacent upland soil was free



from the presence of water above 2435.64 feet during the month of August, part of the summer growing season in Idaho, it is more probable than not that a vegetation-based test would place the location of the OHWM of Priest Lake at Statehood at least two (2) vertical feet lower than the level maintained since 1951.

10. Other independent evidence, to be considered on summary judgment, includes the location of the original GLO meanderline adjacent to the Hudson property.

“Meanderlines” established by government survey are survey lines drawn along the banks of navigable streams for the purposes of defining the sinuosities of the banks of the stream, and as the means of ascertaining the price to be paid by the purchaser to the government for meandered fractional lots.

Heckman Ranches, Inc. v. State, 99 Idaho at 796 (citations omitted). Ordinarily, meanderlines established by surveys of public lands bordering on navigable lakes are not boundary lines. Id. Rather, the boundary line is the OHWM, regardless of the location of the meanderline. Id.

11. In general, meanderlines are established by a government land office (GLO) survey. See Warner Declaration at ¶ 17. Although not a boundary line, the location of a meanderline can have independent historical significance based upon the instructions given to the GLO surveyor for purposes of locating a meanderline. Id. at ¶ 19.

12. The Hudson property is located in Section 3, Township 61 North, Range 4 West, Boise Meridian. Id. at ¶ 20. The Hudson property was initially surveyed for the GLO on September 7, 1900 by Robert Bonser. Id.

13. The Manual of Surveying Instructions in effect at the time of the 1900 Bonser survey would have been the 1894 version of the Manual of Surveying. Id. at ¶ 21.



14. The 1894 Manual of Surveying directed the surveyor to locate the meanderline consistent with the then-existing Ordinary High Water Mark which, in Idaho, coincides with the vegetation line. Id. at ¶ 23.

15. Thus, the existing vegetation line, at the time of the survey, was supposed to form the basis for locating the sinuosity of the shore. Id.

16. Accordingly, while the physical location of the meanderline is not in and of itself a boundary, the location of a given meanderline on an inland navigable lake has independent historical significance because the GLO surveyor was instructed, on a particular date (in this case, September 7, 1900), to place the meanderline where the vegetation line existed. Id. at ¶ 24. For purposes of this proceeding, the State has introduced no reliable lake elevation readings prior to 1930. Id. at ¶ 25. However, we do know that the GLO surveyor placed the meanderline, based on the vegetation line as it existed on September 7, 1900, waterward of 2437.64 feet. Id. at ¶¶ 25 and 26.

17. As a result, there is a discernible distance between the summer level of Priest Lake as maintained from July through September (at elevation 2437.64 feet) and the location of the meanderline as physically determined by Robert Bonser on September 7, 1900 (who employed a pre-dam vegetation test). Id. at ¶ 26.

18. Given pre-dam historical lake elevation readings, the extent of the summer growing season in Idaho, and the physical location of the meanderline adjacent to the Hudson property (before the existence of the dam), Ernest Warner has opined that the Ordinary High Water Mark of Priest Lake, as of July 3, 1890, was at least two (2) vertical feet lower than elevation 2437.64 (the level now maintained from July through September) and perhaps as much as 2.3 vertical feet lower. Id.

at ¶ 35.

19. An Ordinary High Water Mark of 2435.64 (two (2) vertical feet lower than the level now maintained) would have the effect of extending the Hudson property nineteen (19) feet waterward of the boundary as it exists at the artificial level of 2437.64. Id. at ¶ 33.

20. If the Hudson property is extended nineteen (19) feet further into the Lake, based upon an OHWM of 2435.64 feet or lower, nearly all of the improvements challenged by the State of Idaho are on property owned by Dr. Hudson (the same being upland of the OHWM). Id. at ¶ 36.

21. Hudson and his wife acquired their property in 1997. See Hudson Declaration at ¶ 2. In 1997, the Hudsons made application to the Idaho Department of Lands for the placement of a dock in the area of Priest Lake adjacent to their property. Id. at ¶ 4. That permit was issued on July 1, 1997, and the Hudsons subsequently constructed the dock as authorized. Id.

22. Shortly thereafter, it became evident to the Hudsons that increased boat traffic on Priest Lake, coupled with an increase in the typical size of those boats, together with the resulting boat wake activity, was causing damage and degradation to the then-existing shoreline of the Hudson property. Id. at ¶ 5. The destabilization caused by these factors was exacerbated during periods of intermittent storms. Id.

23. Dr. Hudson was aware, and is still aware, that the level of Priest Lake is maintained during the months of July through September through the impoundment of water as the result of the operation of the dam at the outlet of Priest Lake. Id. at ¶ 6. In the fall and winter, when the dam gates are open, the level of Priest Lake recedes in elevation. Id. When the dam is open, and the Lake level recedes, the Hudson property extends further waterward and becomes exposed. Id.

24. Noting the continued destabilization of his property, and believing that the boundary line of his property extended waterward some distance below the elevation of Priest Lake as maintained by the dam, Dr. Hudson sought to preserve and protect his shoreline. Id. at ¶ 7.

25. On a periodic and intermittent basis, from approximately late 1997 through approximately early 2014, Dr. Hudson would perform work on his property in an effort to stabilize the shoreline. Id. at ¶ 8. Dr. Hudson performed this work, by hand, and placed naturally-occurring materials from land contiguous to the beach on his exposed shoreline area. Id. Dr. Hudson placed these materials at or about the area he believed to be the boundary of his property, uninfluenced by the dam, during periods when his property was exposed and free from the presence of water. Id. In other words, all of the work was personally performed by Dr. Hudson, to protect his shoreline from further degradation and destabilization, during periods of time when the dam works had been opened and his property was “dry” and free from water or overflow.

26. Dr. Hudson did not seek a permit for the work he accomplished by hand as he believed, and continues to believe, that he was working on his own property, and placing no encroachments in or on the water or the property of the State of Idaho. Id. at ¶ 9. Dr. Hudson’s work proceeded over a period of several years, on an intermittent basis, when he had the time and when circumstances would warrant. Id.

27. Dr. Hudson never received any complaint or inquiry from the State of Idaho until July 17, 2014. Id. at ¶ 11. Upon receipt of the State’s demand, in the form attached to the Hudson Declaration as Exhibit A, he engaged professionals to assist in the preparation of a responsive plan as requested by the State. Id. at ¶ 12.

28. IDL rejected the recommendation made by professionals engaged on behalf of Dr. Hudson. Id. at ¶ 15. The State of Idaho then brought this proceeding.

29. Drew Dittman, P.E., engaged to develop a responsive plan on behalf of Dr. Hudson, physically inspected and observed the Hudson property. See Declaration of Dittman. Mr. Dittman has concluded that if the boundary line between the Hudson property and the State-owned bed of Priest Lake was extended nineteen (19) feet waterward of the summer level, consistent with a two (2) foot drop in elevation (according to Ernest Warner), then most if not all of Dr. Hudson's improvements would be located on his property as opposed to the property of the State of Idaho. Id. at ¶ 6.

#### **IV. APPLICABLE STANDARDS ON SUMMARY JUDGMENT.**

The Court is well-acquainted with the applicable standards to apply in resolving motions for summary judgment.

The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

See IRCP 56(c). Motions for summary judgment should be granted with caution. If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be denied. Bonz v. Sudweeks, 119 Idaho 539, 808 P.2d 976 (1991). On a motion for summary judgment, all factual inferences are drawn in favor of the non-moving party. Herrera v. Conner, 111 Idaho 1012, 729 P.2d 1075 (Ct. App. 1986).



## V. ARGUMENT.

### A. The Gravamen of the State's First Claim for Relief.

The State's First Claim for Relief seeks a judicial declaration that Hudson has violated Idaho Code §§ 58-1301 and 58-1303. Section 58-1301 provides in part:

No encroachment on, in or above the beds or waters of any navigable lake in the state shall hereafter be made unless approval therefore has been given as provided in this Act [the Lake Protection Act, I.C. § 58-1301, *et seq.*].

See I.C. § 58-1301. The "beds of navigable lakes" is defined in I.C. § 58-1302 as follows:

(b) "Beds of navigable lakes" means the lands lying under or below the "natural or ordinary high water mark" of a navigable lake and, for purposes of this Act only, the lands between the natural or ordinary high water mark and the artificial high water mark and the artificial high water mark, if there be one.

See I.C. § 58-1302(b). The "natural or ordinary high water mark" is defined as follows:

(c) "Natural or ordinary high water mark" means the high water elevation in a lake over a period of years, uninfluenced by man-made dams or works, at which elevation the water impresses a line on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes.

See I.C. § 58-1302(c).

Section 58-1303 provides, "The Board of Land Commissioners shall regulate, control, and may permit encroachments in aid of navigation are not an aid of navigation on, in or above the beds or waters of navigable lakes as provided herein."

Through sworn submissions offered in support of its motion for summary judgment, the State has averred:

5. IDL administers the LPA at Priest Lake to the elevation of 2437.64 feet above mean sea level (MSL), datum of 1929, supplementary adjustment of 1947, which the State considers the natural or ordinary high water mark. This is the summer elevation at which Priest Lake

is maintained during the summer months at Priest Lake in accordance with Idaho Code § 70-507 . . . .

See Affidavit of Mick Schanilec at ¶ 5 (emphasis added).

The State alleges that Hudson has placed encroachments, without a permit, waterward of said OHWM of Priest Lake. The State has averred, under oath, that it contends that the OHWM of Priest Lake is 2437.64 feet. Hudson denies that the OHWM of Priest Lake, at Statehood, which defines the boundaries between the State and Hudson properties, is located at 2437.64 feet. Hudson has offered evidence on summary judgment that would suggest, with all reasonable inferences being given to Hudson, that the actual OHWM of Priest Lake, at Statehood, is at least two (2) vertical feet (if not more) lower than the level urged by the State.

**B. The Location of the OHWM of Priest Lake, At Statehood, Presents a Question of Fact.**

The precise location of an Ordinary High Water Mark is a question of fact. See, e.g., U.S. v. Marion L. Kincaid Trust, 463 F.Supp.2d 680 (E.D. Mich. 2006). In both In Re Sanders Beach, 143 Idaho 443 and Erickson v. State, 132 Idaho 208, the Supreme Court set forth detailed discussion of evidence that could be considered in the context of determining the location of an OHWM on an inland navigable lake in the State of Idaho. While not directly stating that the location of an OHWM in Idaho is a question of fact, such a conclusion can reasonably be drawn from the Court's analyses in the two (2) cited cases.

**C. The State Bears the Burden of Proving that the Hudson Encroachments Are Located Waterward of the OHWM of Priest Lake.**

In support of its motion, the State has alleged that the OHWM of Priest Lake is 2437.64 feet (the summer elevation at which Priest Lake is maintained). See Affidavit of Mick Schanilec at ¶5.

In its Verified Complaint, IDL alleged that Hudson had placed fill material “below the ordinary high water mark of Priest Lake.” See Verified Complaint at ¶ 12. In his Answer, Hudson denied the State’s allegation that the encroachments at issue in this proceeding were constructed below the OHWM of Priest Lake. Hudson alleged:

34. The ordinary high water mark of Priest Lake, as of July 3, 1890, uninfluenced by man-made activities and/or dams, is located in an elevation below the furthest waterward extension of any encroachments on the Defendants’ property.

See Answer and Counterclaim at ¶ 34.

Given the procedural posture of this case, the State has alleged that the OHWM of Priest Lake is at elevation 2437.64 feet, that Hudson has placed encroachments waterward of said alleged OHWM, and that declaratory relief should be granted to the State directing the removal of the subject encroachments. Hudson has denied that the OHWM of Priest Lake is 2437.64 feet and that his encroachments are located waterward of the true OHWM as of July 3, 1890. It is the State’s burden of proof to establish that Hudson’s encroachments are located below the OHWM.

**D. Material Issues of Fact Preclude Entry of Summary Judgment As Requested by the State.**

The State alleges that the OHWM of Priest Lake is at 2437.64 feet. The OHWM of Priest Lake, for purposes of defining the boundary between public and private property, is determined as of July 3, 1890. Some sixty (60) years after Statehood, a dam was constructed on the outlet of Priest Lake, which has subsequently been used to maintain a summer lake elevation of 2437.64 feet. However, as noted by the Supreme Court, dams are for the purposes of impounding water, not for lowering or raising an OHWM. See, e.g., In Re Sanders Beach, 143 Idaho at 450-51.



In fact, the State's own evidence, in the form of hydrographs, show that before the dam became operational, the Lake's elevation normally receded on an annual basis, during the summer growing season, two (2) or more vertical feet lower than 2437.64 feet. See Warner Declaration at Ex. A. In fact, on average, prior to construction of the dam, the Lake's elevation dropped below 2437.64 feet before July 1, which is well within the growing season. It is reasonable to conclude, on a more probable than not basis, that prior to the dam, and on July 3, 1890, vegetation could be found along the shore of Priest Lake below elevation 2437.64, and that the true OHWM (uninfluenced by man-made activity or dams) was not at the elevation urged by the State.

The facts on summary judgment, giving all inferences to Hudson as the non-moving party, also suggest that the original GLO meanderline, which was located in 1910 under instructions that obligated the surveyor to approximate the vegetation line, was located waterward of 2437.64 feet. See Warner Declaration at ¶¶ 17-26 and Ex. C. While Hudson acknowledges that meanderlines are not boundary lines, the fact that the GLO surveyor, in September of 1910, located the vegetation line waterward of 2437.64 feet supports the inference and conclusion that the OHWM of Priest Lake, at Statehood, was lower than the elevation urged by the State.

Since issues of fact exist as to the location of the OHWM at Statehood, and since the evidence in a light most favorable to Hudson supports the conclusion that Hudson's improvements are located above a factually-sustainable OHWM, summary judgment should be denied. The State has predicated its claim on an OHWM of 2437.64 feet. The State has specifically disclaimed and denied that elevation 2437.64 is an artificial high water mark. See State's Memorandum in Support of Motion for Summary Judgment at p. 2, fn. 1. As such, Hudson can only be found in violation of



Sections 58-1301 and 58-1303 if he has placed encroachments below the OHWM. Such a determination cannot be made on summary judgment.

**E. The State is Estopped from Claiming Relief on the Basis of an Artificial High Water Mark (AHWM).**

Idaho Code Sections 58-1301 and 58-1303, under which the State's "First Claim for Relief" is asserted at Paragraphs 18-22 of the Verified Complaint, provide for the regulation of encroachments on navigable lakes between the Ordinary High Water Mark and the Artificial High Water Mark. The Ordinary High Water Mark is a line determined without influence by man-made dams or works. The Artificial High Water Mark is a line resulting from construction of man-made dams or control works. See I.C. §§ 58-1302(c) and (d). For the reasons set forth below, the State's claim must fail.

**1. The State is Estopped from Claiming that There is an AHWM on Priest Lake.**

In its Verified Complaint, the State asserted, under oath, that Hudson had caused "fill material [to be] placed below the ordinary high water mark of Priest Lake." See Verified Complaint at ¶4. Through the Affidavit of Mick Schanilec, Area Manager for the Priest Lake Supervisory Area for IDL, the State has offered sworn testimony that, "the State considers the natural or ordinary high water mark of Priest Lake to be 2437.64 feet." See Affidavit of Mick Schanilec at ¶ 5. In the State's Memorandum offered in support of its motion, the State acknowledges that it "specifically denies that there is an artificial high water mark of Priest Lake." See Memorandum in Support of Motion for Summary Judgment at p. 2, fn. 1.

Having sworn under oath on two (2) occasions that the OHWM of Priest Lake is 2437.64 feet, and having represented to the Court that the State denies that there is an AHWL of Priest Lake, the State now suggests that it is entitled to relief on summary judgment that could only be granted if the factual allegations of the State, made under oath, are disregarded. The law does not countenance such a result.

In Radobenko v. Automated Equipment Corp., 520 F.2d 540, (9<sup>th</sup> Cir. 1975), the Court, under Federal Rules of Civil Procedure 56(c), held that a party could not contradict its sworn statements for purposes of obtaining relief on summary judgment. The Idaho Supreme Court has similarly held as much in other contexts. See, e.g., Arregui v. Gallegos-Main, 153 Idaho 801, 291 P.3d 1000 (2012); Frazier v. J. R. Simplot Co., 136 Idaho 100, 29 P.3d 936 (2001).

The State has specifically asserted, under oath, that the OHWM of Priest Lake is 2437.64. The State has further represented that there is no AHWL of Priest Lake. The state has further asserted, under oath, that the Hudson encroachments are located below the OHWM. That is the specific basis upon which the State asserted its First Claim for Relief (declaratory relief ordering the removal of the encroachments and the payment of a penalty). The State cannot contradict its own sworn testimony, which unequivocally states that there is no AHWL on Priest Lake, for purposes of seeking relief against Hudson on the basis that he is alleged to have placed encroachments between the OHWM of Priest Lake and a non-existent AHWL.

2. **Even if the State Can Disavow Its Sworn Testimony for Purposes of Seeking Relief on Summary Judgment, Hudson's Actions Were on Private Property and Did Not Affect State Waters.**

In the event the Court disagrees with Hudson, and allows the State to seek relief on summary

judgment in contravention of its sworn allegations that there is no AHW on Priest Lake, then Defendant Hudson would ask that this Court consider as follows.

I.C. § 58-1301 sets forth the Legislative intent behind the Lake Protection Act (LPA). That Section is headed “Encroachment on Navigable Lakes.” Fairly read, it precludes encroachments on the waters of any navigable lake in the State to the extent the waters are located below an OHWM or between an OHWM and an AHW. The State has not alleged facts sufficient to show that there is an AHW on Priest Lake and for that reason, the State’s motion should be denied.

However, in the event the Court is inclined to allow the State to pursue relief, by summary judgment, as the case and issues are currently postured, notwithstanding the Defendant’s objection, then the Court should note that Defendant Hudson placed no encroachments on any water. To the extent his encroachments are located between an OHWM and N AHW, then they were located on his own property, they were installed in good faith and in the absence of any water on his property, and they do not invoke the purpose or intention of the Act.

Hudson undertook protective action to stabilize and protect his property, to the extent that it lies above the OHWM, from degradation and destabilization. He did so during periods of low water, when his own property (lying above the OHWM) was free from the influence or presence of water. This is not a circumstance where Hudson constructed a pier, upland of the OHWM, that could be used during periods of high water or artificial water. The work he undertook was to simply place native materials from adjoining areas of his property on his own property. As such, there were no encroachments placed on State waters at the time the native materials were placed on Hudson’s own property.

**F. A Monetary Penalty Is Inappropriate.**


For the reasons stated, the State's request for summary judgment should be denied. In the event the Court is inclined to rule otherwise, then Defendant Hudson suggests that a penalty of Ten Thousand Dollars (\$10,000.00), under the circumstances, is inappropriate. Defendant Hudson acted in good faith and with the reasonable and justified belief that he was protecting his own property, with native materials, and outside the jurisdiction of the Idaho Department of Lands. Defendant Hudson's improvements have existed, in one form or another, for nearly twenty (20) years. Defendant Hudson made a good faith response, through professionals, to the State's request for a remediation plan and the State summarily rejected the same. For reason unknown to Hudson, despite the presence of similar encroachments elsewhere on Priest Lake, he has been the only party subjected to an attempted enforcement action.

**VI. CONCLUSION.**

Based upon the reasons and authorities set forth above, Defendant Philip Hudson respectfully submits that the State has failed to show that Hudson's encroachments were located below the OHWM of Priest Lake. Defendant Hudson further submits that the State is estopped to seek relief on the basis that his encroachments are located below an AHW of Priest Lake, having specifically and emphatically denied, under oath, that there is an AHW on Priest Lake. Hudson requests that all relief sought by the State on summary judgment be denied and that the matter be set for trial wherein the State will be required to prove that Hudson's encroachments are in fact below the OHWM of Priest Lake as it existed on July 3, 1890.



DATED this 8<sup>th</sup> day of June, 2016.


  
\_\_\_\_\_  
JOHN F. MAGNUSON  
Attorney for Defendant/Counterclaim Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of June, 2016, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Angela Schaer Kaufmann, Esq.  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
P.O. Box 83720  
Boise, ID 83720

\_\_\_\_ U.S. MAIL  
  X   E-MAIL TRANSMISSION  
\_\_\_\_ HAND DELIVERED  
  X   OVERNIGHT MAIL  
\_\_\_\_ FACSIMILE - 208\854-8072

  
\_\_\_\_\_

HUDSON-OPP.BRF.wpd

JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

Attorney for Defendant/Counterclaim  
Plaintiff Philip Hudson



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

---

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Counterclaim Defendants.

NO. CV-15-1075

**DECLARATION OF  
PHILIP HUDSON**

My name is PHILIP HUDSON and I make this Declaration upon my own personal  
knowledge and belief.

1. I am over the age of eighteen, have personal knowledge of the matters set forth herein, and am otherwise competent to testify thereto.

2. In April of 1997, my wife Jan and I acquired title to property on Priest Lake. The property is described as follows:

Lot 29 of Southshores Addition to Huckleberry at Priest Lake  
Planned Unit Development, according to the Plat thereof, recorded in  
Book 5 of Plats, Page 149, records of Bonner County, Idaho.

The property described above is referred to herein as "the subject property" or "my property."

3. My wife and I have maintained a home on the subject property since shortly after our acquisition of the same.

4. In 1997, my wife and I made application to the Idaho Department of Lands for the placement of a dock in the area of Priest Lake adjacent to our property. That Permit was issued on July 1, 1997 and we subsequently constructed the dock as authorized.

5. Shortly thereafter, it became evident that increased summer boat traffic on the Lake, coupled with an increase in the typical size of those boats, together with the resulting boat wake activity, was causing damage and degradation to the then-existing shoreline area of our property. The destabilization caused by these factors was exacerbated during periods of intermittent storms.

6. I was aware, and am still aware, that the level of Priest Lake is artificially maintained during the months of July through September through the impoundment of water as the result of the operation of a dam at the outlet of Priest Lake. In fall and winter, after the dam gates are opened, the level of Priest Lake, recedes in elevation. When the dam is opened, and the Lake level recedes, my property extends further waterward and becomes exposed.

7. Noting the continuing destabilization and degradation of my property, and believing that the boundary line of my property extended waterward some distance below the elevation of Priest Lake as artificially-maintained by the dam, I sought to preserve and protect my shoreline as described herein.

8. On a periodic and intermittent basis, from approximately some time in late 1997 through approximately early 2014, I would perform hand-work on my property in an effort to stabilize my shoreline. This work was done by me, by hand, and involved the use and placement of naturally-occurring materials from land contiguous to the beach. I placed these materials at or about the area I believed to be the boundary of my property, uninfluenced by the dam, during periods when exposed and free from the presence of water. In other words, all of the work that I personally did to stabilize my shoreline, and to protect the same from further degradation and destabilization, was done after the dam works had been opened and the property upon which I worked was “dry” and not covered by water or subject to overflow.

9. I did not seek a permit for the work I accomplished by hand, as described above, as I believed, and continue to believe, that I was working on my own property, and placing no encroachments in or on the water or the property of the State of Idaho. My work proceeded over a period of several years, on an intermittent basis, when I had time and when circumstances would warrant.

10. With respect to the improvements which the State seeks to remove through this proceeding, I never placed any of said improvements, which consist of naturally-occurring materials, “in water.” My work was accomplished when the artificially-maintained level of the Lake was allowed to recede in the fall and winter.



11. I never received any complaint or inquiry from the State of Idaho until July 17, 2014, some seventeen (17) years after I had purchased the property. I ultimately received a letter from the State in the form attached hereto as Exhibit A, dated July 17, 2014.

12. Upon my receipt of the correspondence attached hereto as Exhibit A, I engaged legal counsel for the purposes of assisting in engaging a qualified professional to assist in the preparation of a responsive plan as requested by the State. Mr. Magnuson's initial response to IDL, dated August 6, 2014, and sent on my behalf, is attached hereto as Exhibit B.

13. Ultimately, I engaged Drew C. Dittman, P.E., to assist in developing a responsive plan.

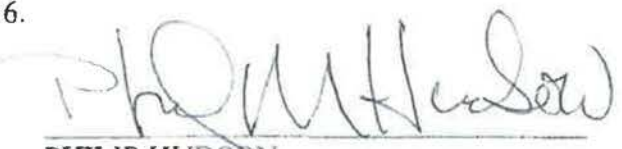
14. On March 16, 2015, Mr. Magnuson, my counsel, responded to IDL in the form attached hereto as Exhibit C. Mr. Magnuson's letter includes a copy of the investigative report and conclusions of Mr. Dittman.

15. IDL rejected the recommendation made by Mr. Dittman and then filed this suit.

16. Included with Mr. Dittman's letter (Exhibit C) are photographs of the subject property and the encroachments at issue. The Court will note that the stabilization work I performed is located waterward of the encroachments authorized by the State and do not serve to impair or impede navigability in any way, shape, or form.

I certify under penalty of perjury pursuant to the laws of the State of Idaho that the foregoing is true and correct.

DATED this 7 day of June, 2016.

  
PHILIP HUDSON

CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of June, 2016, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Angela Schaer Kaufmann, Esq.  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
P.O. Box 83720  
Boise, ID 83720

X U.S. MAIL  
X E-MAIL TRANSMISSION  
       HAND DELIVERED  
       OVERNIGHT MAIL  
       FACSIMILE - 208\854-8072



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HUDSON-PHILIP.DEC.wpd

# **EXHIBIT A**

**PRIEST LAKE  
SUPERVISORY AREA**  
4053 Cavanaugh Bay Rd  
Coolin ID 83821  
Phone (208) 443-2516  
Fax (208) 443-2162



**TOM SCHULTZ, DIRECTOR**  
*An equal opportunity employer*

**STATE BOARD OF LAND COMMISSIONERS**  
*C. L. "Butch" Otter, Governor*  
*Ben Ysursa, Secretary of State*  
*Lawrence G. Wasden, Attorney General*  
*Brandon D. Woolf, State Controller*  
*Tom Luna, Sup't of Public Instruction*

July 17, 2014

CERTIFIED

Philip Hudson  
E. 4606 Lane Park Rd.  
Mead, WA 99021

Re: Unapproved Artificial Fill Below the Ordinary High Water Mark, Priest Lake

Dear Mr. Hudson:

A few weeks ago while performing navigation/encroachment permit work on Priest Lake I noticed your lot 29 at Sandy Shores appeared to have an elevated beach retained with a sea wall. After reviewing our aerial photo records and other aerial photos from Google earth there appears to be an artificially filled area lakeward from the ordinary high water mark. The filled area as it appears on a Google earth photo September 6, 2012 is approximately 35 feet N-S X 22 feet E-W at the widest point. This extends northward along the shoreline from the north side of your dock's approach.

Enclosed is a series of aerial photos starting in 1998. In 1998 the dock was in place having been permitted in 1997 (L-97-S-983) and there is no evidence of any lakebed filling from the ordinary high water mark. The next aerial photo from 2004 taken after the residence on lot 29, Sandy Shores was built shows lakebed fill. In 2012, the aerial photo shows lakebed fill and a sea wall in better detail.

From these aerial photos it is evidence that the artificial fill over the lakebed and below the ordinary high water mark has occurred after the Lake Protection Act of 1974. You have 30 days from the date of this letter to submit a plan for your deeded lot 29, South Shores, addressing the removal of all fill over the lakebed that is below the ordinary high water mark, Priest Lake. An on-site visit by this office is necessary.

EXHIBIT A



If you have any questions, please contact me at [critchie@idl.idaho.gov](mailto:critchie@idl.idaho.gov) or (208) 443-2516 Monday – Friday between 8:00AM and 4:30PM (PDT). A site visit can be scheduled

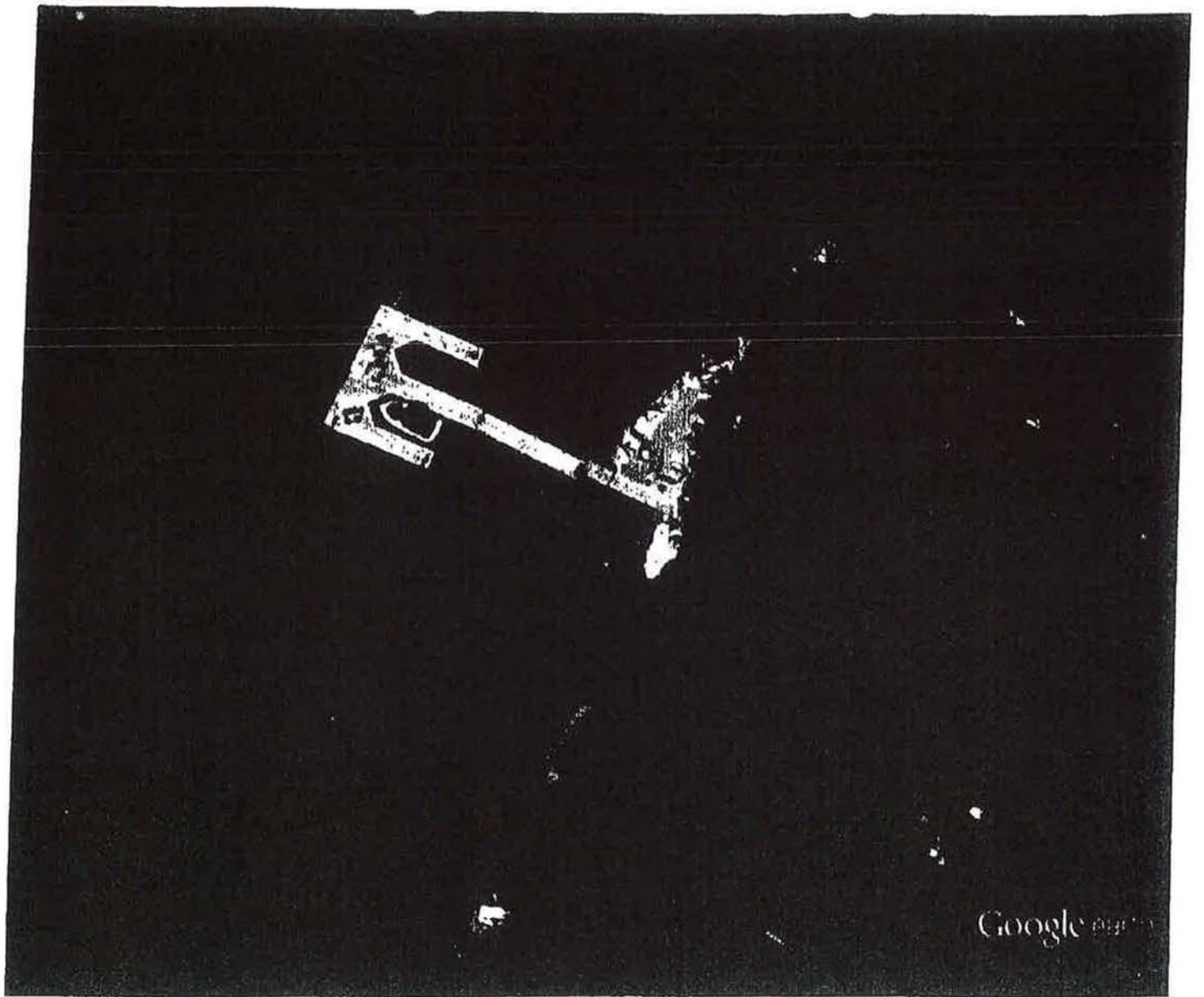
Sincerely,

A handwritten signature in black ink, appearing to read 'Carl Ritchie', with a stylized, cursive script.

Carl Ritchie  
Lands Coordinator/Nav Waters  
Priest Lake

Enclosure

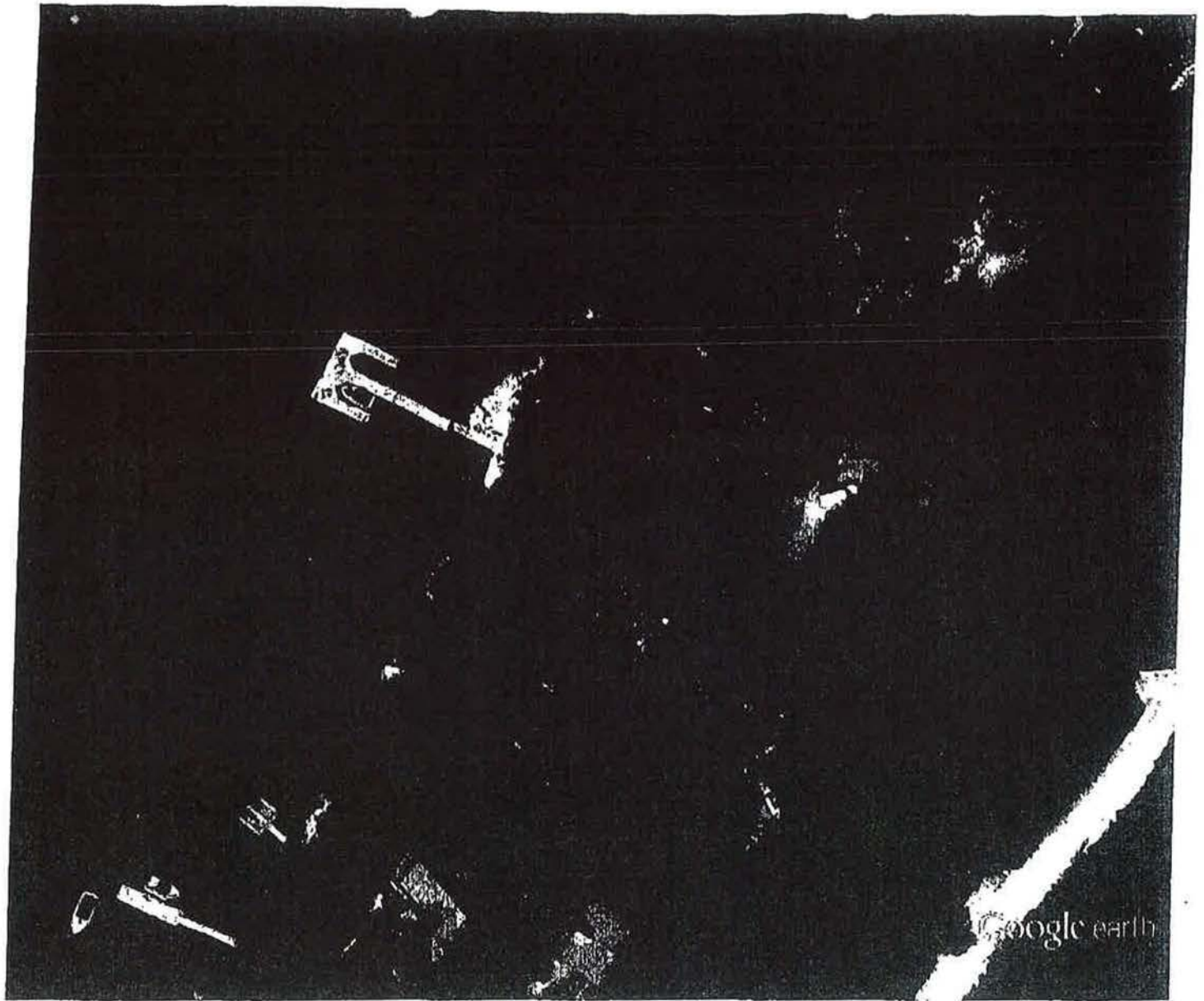
cc: File



Google earth



*PHOTO FROM  
9/6/2012*



Google earth



9/6/2012



Image USDA Farm Service Agency

Google earth

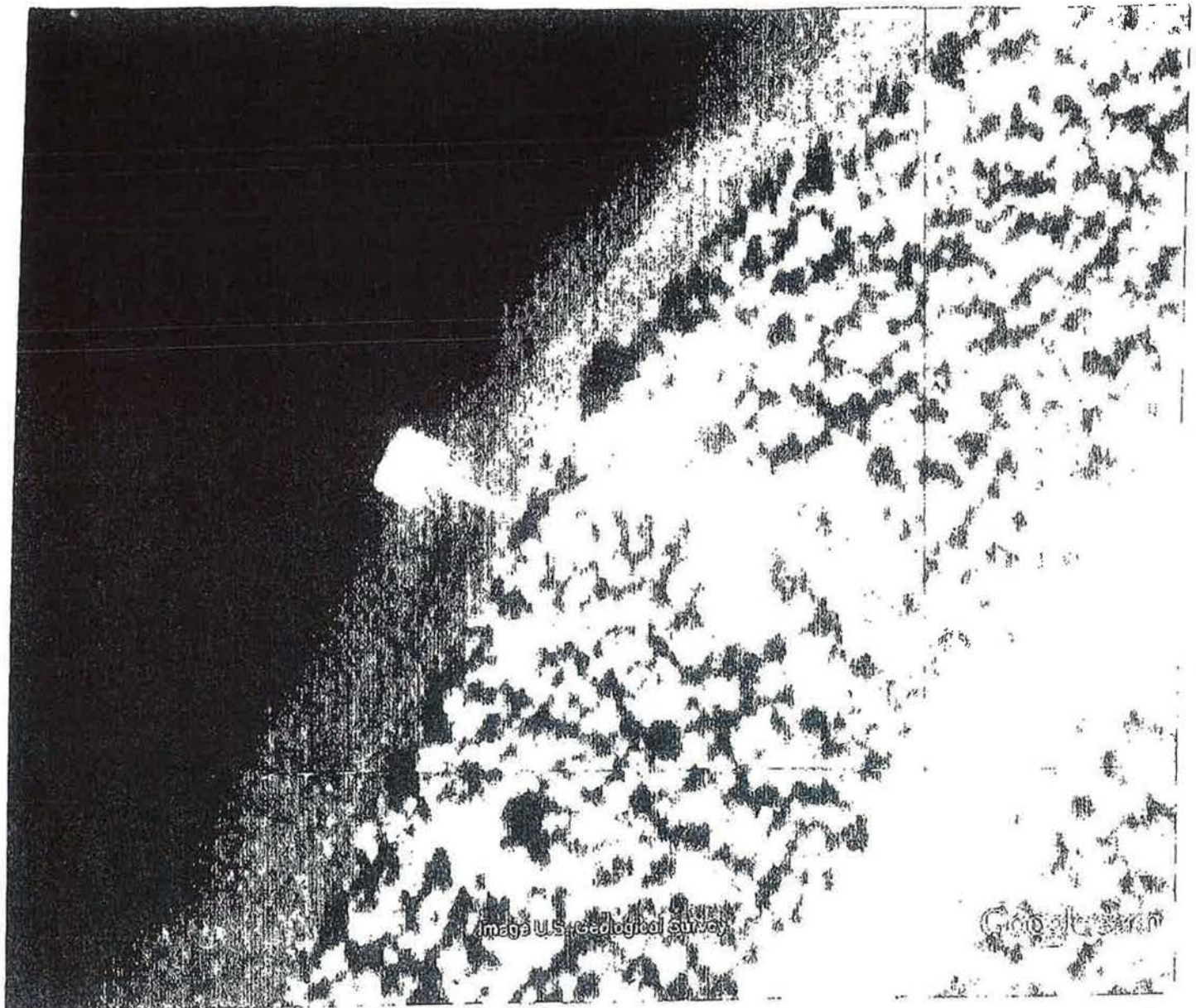
Google earth

feet 300  
meters 100



9/26/2004





Google earth

feet 300  
meters 100



8/10/1998

# **EXHIBIT B**

JOHN F. MAGNUSON

ATTORNEY AT LAW

ADMITTED IN IDAHO AND WASHINGTON

TELEPHONE

208•667•0100

FAX

208•667•0500

P.O. Box 2350

1250 NORTHWOOD CENTER COURT

SUITE A

COEUR D'ALENE

IDAHO 83816

August 6, 2014

Idaho Department of Lands  
Priest Lake Supervisory Area  
Attn: Carl Ritchie, Lands Coordinator/  
Navigable Waters  
4053 Cavanaugh Bay Road  
Coolin, ID 83821

Re: Philip M. Hudson/Lot 29-Sandy Shores (Priest Lake)

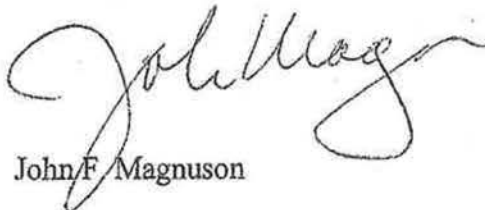
Dear Mr. Ritchie:

I represent Dr. Philip Hudson. Dr. Hudson is in receipt of your July 17 letter.

We are in the process of engaging a qualified professional to assist in the preparation of a responsive plan as outlined in your July 17 letter. This will likely not be completed within thirty (30) days. However, I write to assure you that you have our attention, that we will be engaging a professional to prepare a responsive plan, and that we would hope to maintain an open line of communication and dialogue as we work through this process.

If you have any questions, please let me know. Thank you.

Sincerely,



John F. Magnuson

JFM/js

cc: Philip Hudson, M.D.

IDL-PRIEST-RITCHIE-HUDSON.LTR.wpd

EXHIBIT **B**



# **EXHIBIT C**



JOHN F. MAGNUSON

ATTORNEY AT LAW

ADMITTED IN IDAHO AND WASHINGTON

TELEPHONE

208•667•0100

FAX

208•667•0500

P.O. Box 2350

1250 NORTHWOOD CENTER COURT

SUITE A

COEUR D'ALENE

IDAHO 83816

March 16, 2015

Idaho Department of Lands  
Priest Lake Supervisory Area  
Attn: Carl Ritchie, Lands Coordinator  
4053 Cavanaugh Bay Road  
Coolin, ID 83821

Re: Philip M. Hudson/Lot 29-Sandy Shores (Priest Lake)

Dear Mr. Ritchie:

Please let this letter serve as a formal response to your July 17, 2014 Notice to Dr. Hudson. On behalf of Dr. Hudson and myself, we would like to thank you and the Department for your patience as we have worked through these issues.

Enclosed you will find a February 25, 2015 Report and Recommendation from Drew C. Dittman, P.E. Mr. Dittman conducted a thorough site investigation to formulate a recommendation for an appropriate plan regarding the potential for removal of "all fill over the lakebed that is below the ordinary high water mark, Priest Lake" at the Hudson property. In this regard, some additional discussion is merited.

As you are aware, the State of Idaho "owns, in trust for the public, title to the bed of navigable waters below the OHWM as it existed on July 3, 1890, when Idaho became a State." Erickson v. State, 132 Idaho 208, 970 P.2d 1 (1998). As you are also aware, the current summer level of Priest Lake is not the same as the OHWM.

The dam which was constructed nearly forty years ago by Washington Water Power (now Avista) artificially maintains the summer level of the Lake such that portions of deeded private property are submerged during summer months. Any use of a current "vegetation test" is not appropriate, as the boundary between upland private property and the State's submerged lakebed is determined as it existed on July 3, 1890. See, e.g., In Re Sanders Beach, 143 Idaho 443, 147 P.3d 75 (2006).

Based upon site investigations and analyses, it does appear that most of the encroachments placed by Dr. Hudson at or near the artificial high water mark are actually on property which is likely "private" and encompassed in his Deed. There may be some minor variations, but it generally appears that Dr. Hudson has constructed improvements mostly located on his own property rather than on the

EXHIBIT C

March 16, 2015

Page 2

State-owned lakebed.

Further, I would ask that you consider the purpose of the improvements, which was to mitigate further erosive activity caused by sources unattributable to Dr. Hudson. Simply put, without some sort of barrier, not unlike those of many neighboring properties, Dr. Hudson would have seen his own private property further degraded and diminished.

I recognize that reasonable minds might differ on how and what to do with this issue. However, and without acknowledging that the improvements are in fact located on the State-owned lakebed, and in light of Mr. Dittman's conclusions that any significant removal would cause more environmental damage than allowing the encroachments to remain, I suggest the following:

- (1) Dr. Hudson enter into an acceptable Lease Agreement with the State allowing for the continued maintenance of those portions of his existing improvements, to the extent they are waterward of the OHWM, with a lease payment typical of other parties who have previously dealt with the State on similar issues. This Lease would not necessarily constitute an admission or acknowledgment by Dr. Hudson as to the bona fides of the State's position, but would acknowledge the State's jurisdiction and it would be entered into as a compromise of a disputed matter.
- (2) Dr. Hudson would reimburse the State for its reasonable staff time in addressing, investigation, and documenting the alleged violation and the Lease described in Section (1) above.
- (3) As a condition of the Lease, Dr. Hudson would commit and agree that no further encroachments of any kind or nature would be constructed or expanded without going through the permitting process established by the Lake Protection Act and the regulations promulgated thereunder.

I am available to discuss these issues with you at your convenience, as is Dr. Hudson. Again, we thank you for your patience as we have worked through this process. No delay was intended.

Sincerely,



John F. Magnuson

JFM/js

Encl.

cc: Dr. Philip Hudson  
IDL-RITCHIE- HUDSON3.wpd

John F. Magnuson  
Attorney at Law  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, Idaho 83816

February 25, 2015



**RE: Hudson Residence – Priest Lake, Idaho  
Lot 29 Sandy Shores**

Dear Mr. Magnuson:

At your request, I have performed a thorough investigation of the Hudson residence as it relates to the lakebed encroachment claims made by the Idaho Department of Lands in its letter of July 17, 2014 to Dr. Hudson. This letter contains my professional observations and opinions.

I offer the following background information on the hydrology of Priest Lake. The water level in Priest Lake is artificially controlled by the Priest Lake Dam. This dam was constructed in 1978 and is used primarily for hydroelectric power generation and recreational control of Priest Lake. The dam itself is a relatively small concrete gravity dam approximately 8' in height and is operated by the Avista Corporation. Lake levels can fluctuate as much as 4' feet during winter drawdown. The summer pool elevation of Priest Lake is 2,437.8 and is measured by a gauge (USGS 1239300) located at the South end of the lake near Coolin, Idaho. Instantaneous gauge readings as well as historic measurements at this location are readily available on the USGS website.

Prior to visiting the site, I inquired at length of Dr. Phil Hudson regarding his situation and the history and characteristics of his beach-front property. The property in question is located in Huckleberry Bay of Priest Lake and has a physical address of 630 South Shores Road, Coolin, Idaho 83821. The property is legally described as Lot 29 of South Shores Addition. Dr. and Mrs. Hudson acquired the property in 1996, and installed the dock shortly thereafter. At this time, the community of South Shores consisted of approximately 45 unimproved lots with lake access and frontage. As these lots were sold over the years, individual homeowners separately developed their own portions of shoreline and improved their respective beach frontage. The majority of the South Shores lots were very similar to Dr. Hudson's lot in that they consisted of fairly steep slopes and rocky shorelines.

During the next several years, Dr. Hudson and his family improved his shoreline by creating a beach and seawall. He informed me that this shoreline is prone to suffering damage from the intense storms that move in quickly from the North. In an effort to



provide stability and to prevent erosion to the shoreline, Dr. Hudson placed a seawall upland of the Lake's pre-dam ordinary level, which he reinforced with sack-mix concrete, sand and rocks. Dr. Hudson expressed to me his concerns that he had only sought to improve the shoreline to prevent further erosion and destruction of his property. He also conveyed to me that all of these improvements were done "by hand" and with no mechanical equipment.

On October 25, 2014, I visited the site and performed an inspection of the shoreline of Dr. Hudson's property and the adjoining neighbors. According to the USGS website, the elevation of Priest Lake on the day of my visit was 2,435.8, approximately 2' below summer pool level. With the water level being below summer pool, I was able to examine the improvements on the Hudson property in full detail. My investigations confirmed exactly what Dr. Hudson had previously informed me about the steep slopes, rocky shorelines and minimal access to the South Shores community. I walked the shoreline in both directions from the Hudson residence and noticed that several of the frontages contained man-made seawalls, beaches and other improvements that benefitted the homeowners and could potentially be considered to constitute encroachments.

There are several man-made seawalls on the Hudson property that consist of large rocks and boulders hand-stacked together, secured with concrete/mortar mix, and backfilled with sand and gravel. The seawalls vary in height from 2' to 5', and are substantial in structure and mass. They appear to be very stable, and exhibit minimal or no signs of erosive activity. The area upland and adjacent to the seawall contains sand and gravel and is well-maintained. This upland area does not exhibit any signs of erosive activity. I have attached several photographs that I took during my site visit for reference.

It is my understanding that the Idaho Department of Lands has determined that the improvements created by Dr. Hudson along the shoreline are an encroachment into the lake bed and that he should submit a responsive correction plan addressing the possibility of removal of the encroachments.

I will not render an opinion as to whether or not the improvements created by Dr. Hudson area in fact are a violation of the Lake Protection Act, as that is beyond my expertise. However, it is my professional opinion that the removal of the seawalls in question will result in substantial and significant environmental disruption and damage to the shoreline, both above and below the summer pool level. It would also potentially result in extensive damage to the upland portion of the Hudson property.



Although the structures were built by hand, demolition of the walls would require the use of heavy equipment such as a large backhoe or track mounted excavator. The amount of concrete and mortar used to build the walls, and the sheer mass of the walls alone would necessitate the use of this type of heavy equipment, not only for demolition but for removal of the material from the site as well. The use of this machinery would cause greater environmental damage and impact to the shoreline and could potentially pose a significant environmental risk operating within close proximity to the water. It is important to note that the reason the seawalls and beaches were built by hand and without mechanical equipment is due to the lack of adequate access to the shoreline. The property is heavily treed and contains steep slopes. The mobilization of such heavy equipment to the shoreline would be near impossible without causing major disturbance to the upland and native vegetation and the potential removal of trees, consequently creating more unnecessary erosion, and this assumes that temporary construction easements could be negotiated with neighboring property owners. The other option would be to float a piece of equipment in via barge. This also has the potential to cause unnecessary disturbances and damage to the shoreline below the water level as the barge would ultimately need to dock and stabilize so that the equipment could be mobilized. This method may well be cost prohibitive.

My professional recommendation would be to leave the seawall and beaches on the Hudson property in their current condition and configuration as they have been properly constructed and have served their intended purpose of stabilizing the shore from erosive action. There is also a significant question as to whether the encroachment is located below the "ordinary" (pre-dam) high water mark, but again, this is a legal question beyond my expertise. Thank you for your time and consideration in this matter.

Regards,

Drew C. Dittman, PE  
Principal



2/25/15

**PRIEST LAKE  
SUPERVISORY AREA**  
4053 Cavanaugh Bay Rd  
Coolin ID 83821  
Phone (208) 443-2516  
Fax (208) 443-2162



**TOM SCHULTZ, DIRECTOR**  
*An equal opportunity employer*

**STATE BOARD OF LAND COMMISSIONERS**  
*C. L. "Butch" Otter, Governor*  
*Ben Ysursa, Secretary of State*  
*Lawrence G. Wasden, Attorney General*  
*Brandon D. Woolf, State Controller*  
*Tom Luna, Sup't of Public Instruction*

July 17, 2014

CERTIFIED

Philip Hudson  
E. 4606 Lane Park Rd.  
Mead, WA 99021

Re: Unapproved Artificial Fill Below the Ordinary High Water Mark, Priest Lake

Dear Mr. Hudson:

A few weeks ago while performing navigation/encroachment permit work on Priest Lake I noticed your lot 29 at Sandy Shores appeared to have an elevated beach retained with a sea wall. After reviewing our aerial photo records and other aerial photos from Google earth there appears to be an artificially filled area lakeward from the ordinary high water mark. The filled area as it appears on a Google earth photo September 6, 2012 is approximately 35 feet N-S X 22 feet E-W at the widest point. This extends northward along the shoreline from the north side of your dock's approach.

Enclosed is a series of aerial photos starting in 1998. In 1998 the dock was in place having been permitted in 1997 (L-97-S-983) and there is no evidence of any lakebed filling from the ordinary high water mark. The next aerial photo from 2004 taken after the residence on lot 29, Sandy Shores was built shows lakebed fill. In 2012, the aerial photo shows lakebed fill and a sea wall in better detail.

From these aerial photos it is evidence that the artificial fill over the lakebed and below the ordinary high water mark has occurred after the Lake Protection Act of 1974. You have 30 days from the date of this letter to submit a plan for your deeded lot 29, South Shores, addressing the removal of all fill over the lakebed that is below the ordinary high water mark, Priest Lake. An on-site visit by this office is necessary.

If you have any questions, please contact me at [critchie@idl.idaho.gov](mailto:critchie@idl.idaho.gov) or (208) 443-2516 Monday – Friday between 8:00AM and 4:30PM (PDT). A site visit can be scheduled

Sincerely,

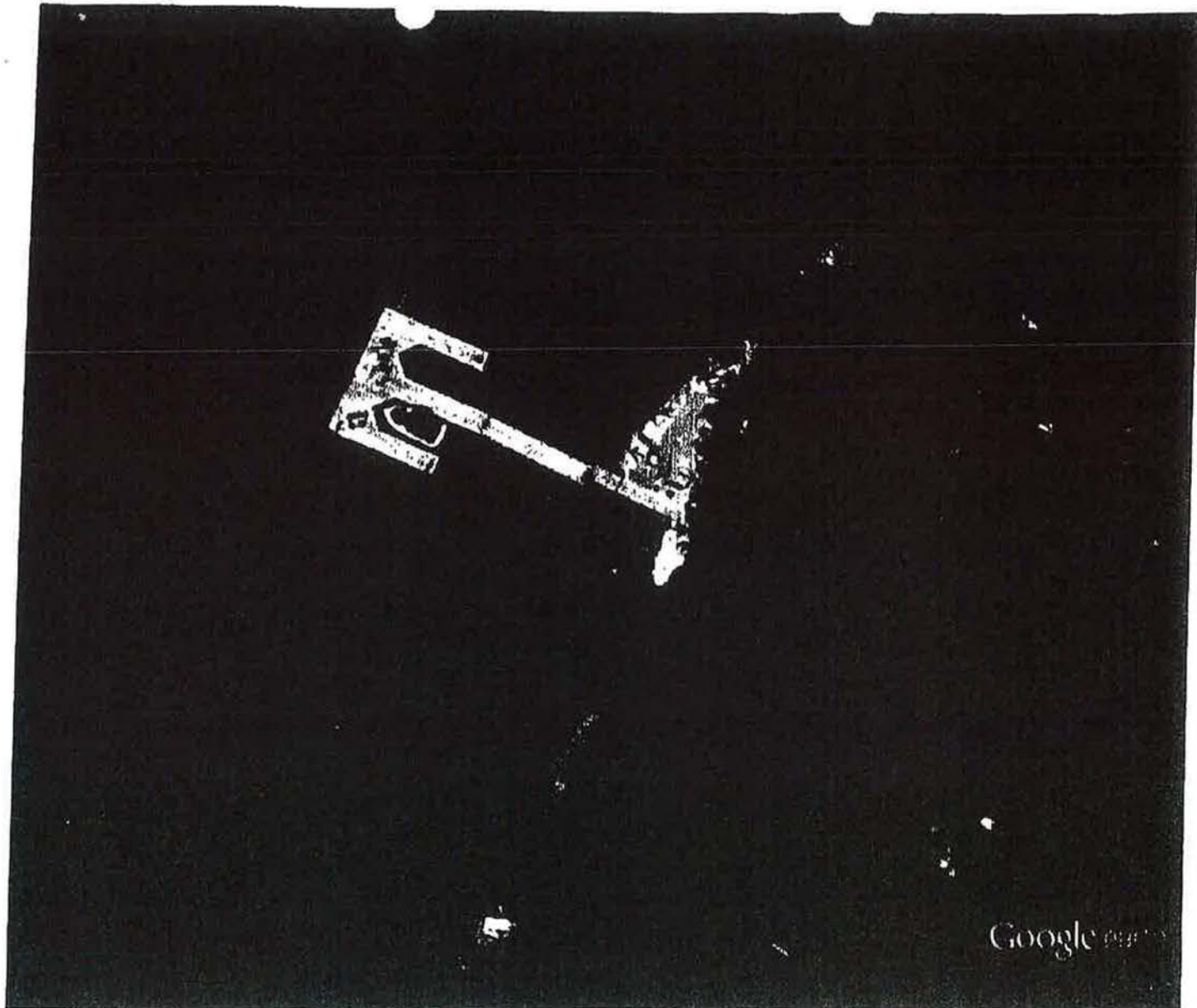
A handwritten signature in black ink, appearing to read 'Carl Ritchie', with a long horizontal flourish extending to the right.

Carl Ritchie  
Lands Coordinator/Nav Waters  
Priest Lake

Enclosure

cc: File



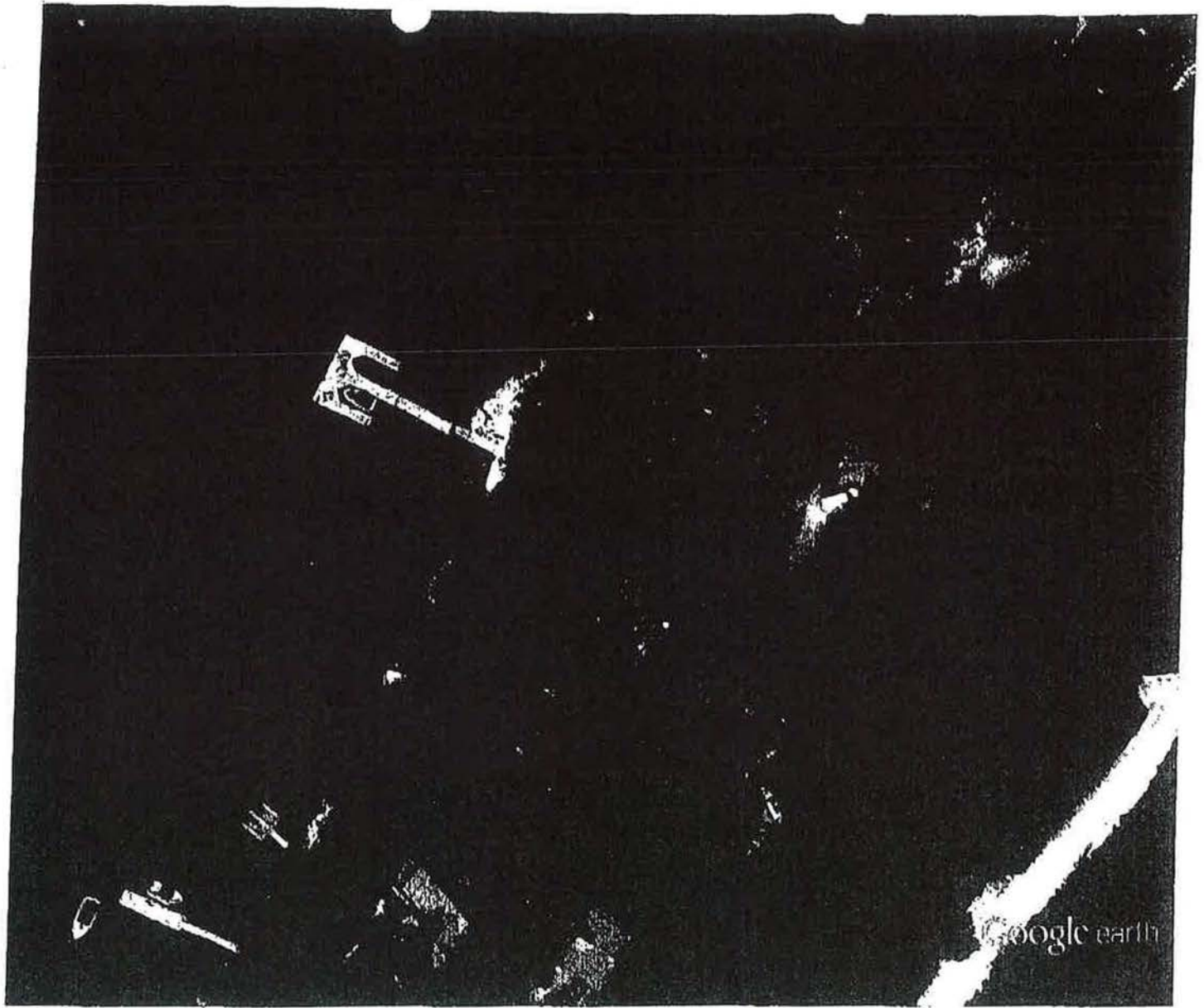


Google earth



*PHOTO FROM  
9/6/2012*





Google earth

feet 200  
meters 80



9/6/2012



Image USDA Farm Service Agency

Google earth

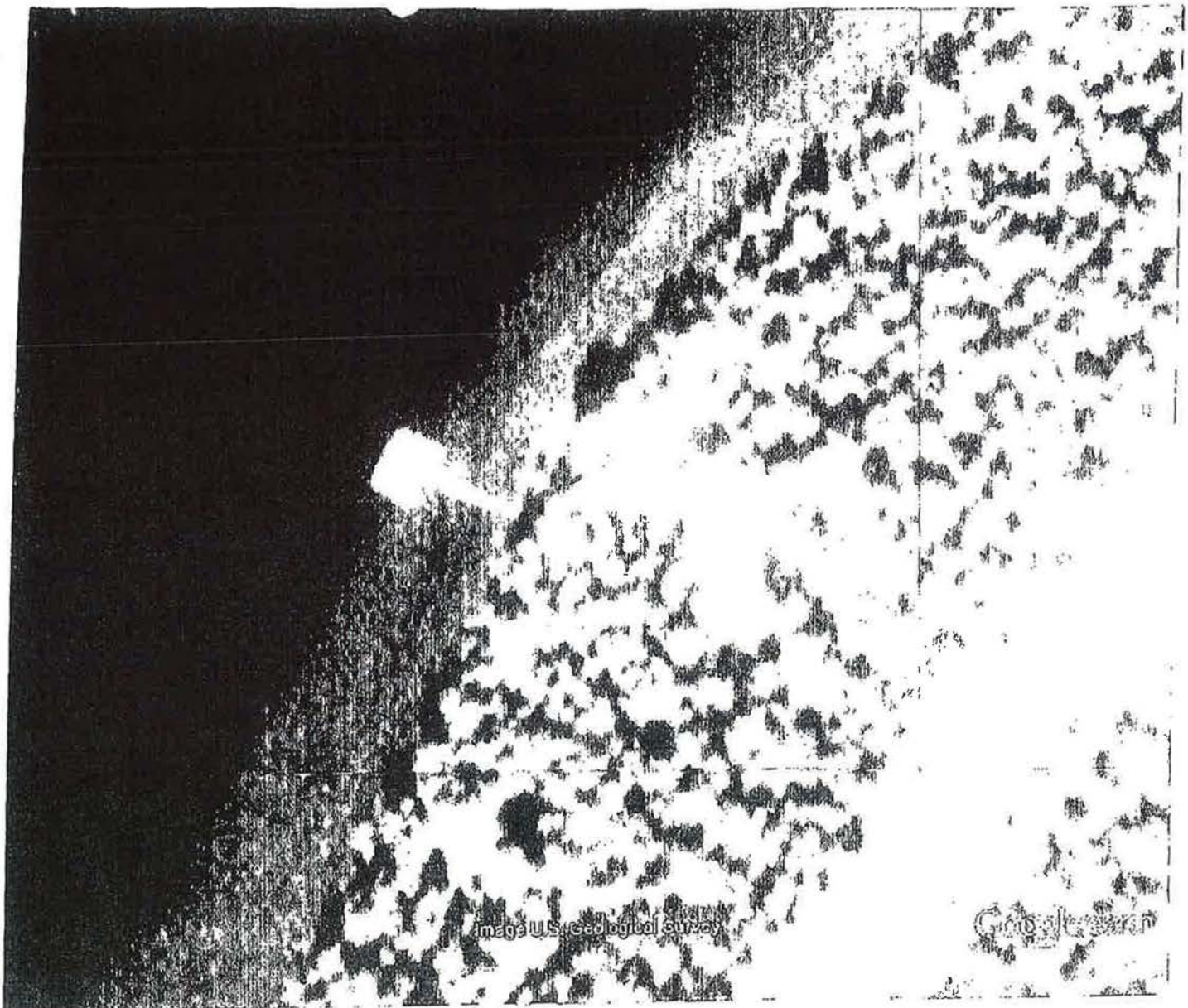
Google earth

feet 300  
meters 100



9/26/2004





Google earth

feet 300  
meters 100



8/10/1998













JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

Attorney for Defendant



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

---

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Counterclaim Defendants.

NO. CV-15-1075

**DECLARATION OF ERNEST M.  
WARNER, PLS**

I, ERNEST M. WARNER, under penalty of perjury, declare as follows:

1. I am over the age of 18, have personal knowledge of the matters set forth herein, and am otherwise competent to testify thereto.

**PROFESSIONAL CREDENTIALS.**

2. I have 43 years of surveying experience and have been licensed as a Registered Professional Land Surveyor in the state of Idaho for 34 years (P.L.S. No. 4565). I am also licensed as a Professional Land Surveyor in the state of Washington (P.L.S. No. 27128).

3. I have served as a faculty member at North Idaho College on a continuous basis since 1998, teaching surveying principles.

4. I have pursued continuing education in the form of professional seminars regarding surveying, riparian/littoral rights, boundary resolutions, and similar matters.

5. I have previously provided expert testimony in litigation involving the location of littoral rights and the establishment of ordinary high water marks. I offered testimony on these issues in Erickson v. State, 132 Idaho 208, 970 P.2d 1 (1998). I also provided consultation and expert opinion by way of affidavit in In Re: Sanders Beach, 143 Idaho 443, 147 P.3d 75 (2006). I have provided expert witness testimony other proceedings dealing with rights-of-way and boundary disputes.

6. I have served as the chairman for the Northern Section of the Idaho Society of Professional Land Surveyors on two occasions (1990 and 1997), and as President of the Idaho State Association (1993-1994).

**SCOPE OF REVIEW FOR PURPOSES OF THIS DECLARATION.**

7. For purposes of this Declaration, and the opinions expressed herein, I have reviewed



and considered the following: matters of record title, including a copy of the original Government Land Office (GLO) survey, contemporaneous instructions given to the original GLO surveyor, and subsequent surveys; my observations of survey monuments; the relevant chain of title; aerial maps of the disputed area; my observations of evidence of the physical features of the Defendant's property and neighboring properties; and the affidavits of Mick Schanilec and Matthew Anders (filed by the Plaintiffs in this proceeding).

8. In addition to the information described above, I rely upon my education, training, and experience as a Professional Land Surveyor in my analysis of the foregoing information to aid and assist in the preparation and expression of the opinions contained herein.

**BACKGROUND FACTS REGARDING ELEVATION  
LEVELS OF PRIEST LAKE.**

9. The State of Idaho owns in trust for the public title to the bed of navigable waters below the ordinary high water mark (OHWM) as it existed at the time Idaho was admitted into the Union (July 3, 1890). See, e.g., Erickson v. State, 132 Idaho 208, 210 (1998).

10. A dam was constructed by the State of Idaho, at the outlet of Priest Lake, in approximately 1950. See Affidavit of Matthew Anders at ¶11. The dam was first used for water storage on August 9, 1950. Id.

11. Dams do not lower the lake level of a given waterway. Dams increase the elevation of the lake level of a given waterway. See In Re: Sanders Beach, 143 Idaho at 443, 450 (2006). In other words, the ordinary high water mark of a given waterway (determined as of the date of statehood) is not higher before the dam was constructed than it was afterwards. Id.

12. The dam constructed at the outlet of Priest Lake and utilized for water impoundment purposes from and after August 9, 1950 has maintained the level of Priest Lake at an elevation of

2437.64 feet msl (NGVD 1929), as measured on the Outlet gage, in July, August, and September, on an annual basis, since 1951. See Affidavit of Matthew Anders at ¶19.

13. In simple terms, since the dam became fully operational in 1951, water has been impounded in Priest Lake every year, for July, August, and September, at an elevation of 2437.64 feet msl (NGVD 1929). Prior to construction of the dam, the level of Priest Lake would have naturally receded below 2437.64 feet during the months of July, August, and September.

14. Attached hereto as Exhibit A is a true and correct copy of Exhibit E to the Affidavit of Matthew Anders, with interlineations I have placed on the same. Mr. Anders identified Exhibit E as a hydrograph that was “created by averaging all lake level heights on a given day for the periods 1930-1950 (pre-dam) and 1951-2015 (post-dam), then plott[ed] ... on the graph.” See Affidavit of Matthew Anders at ¶15.

15. On the copy of Exhibit E attached hereto as Exhibit A, I have identified the elevation levels of Priest Lake that correspond to the gage heights as expressed therein. For example, a gage height of 3.0 equates to a lake elevation of 2437.64. This is the elevation at which the lake has been maintained from July through September of every year from 1951 based upon the operations of the dam.

16. Exhibit A also shows the corresponding lake elevations derived from gage readings before the dam became operational (from 1930 through 1950). Based upon Mr. Anders’ affidavit, the data from 1890 through 1930, to the extent that it even exists, is fragmentary.

#### **EVIDENCE REGARDING MEANDER LINES.**

17. Meander lines are lines established by a Government Land Office (GLO) survey. As the Supreme Court stated in Erickson v. State, meander lines are “survey lines drawn along the banks

of navigable streams for the purposes of defining the sinuosities of the banks of the stream, and as the means of ascertaining the price to be paid by the purchaser to the government.” 132 Idaho at 212.

18. Meander lines are not in and of themselves boundary lines. The boundary line of a navigable river or lake is determined by the location of the OHWM at Statehood. Id.

19. Nonetheless, although a meander line is not in and of itself a boundary line, the location of that line can have independent historical significance based upon the instructions given to the GLO surveyor for purposes of locating a meander line.

20. The property of Defendant Hudson is located in Section 3, Township 61 North, Range 4 West, Boise Meridian. Based upon GLO records, the identified property was initially surveyed on September 7, 1900 by Robert Bonser. Mr. Bonser was surveying under Contract No. 208 and would have been instructed to utilize the Manual of Surveying instruction in effect at that time.

21. It is my belief, opinion, and conclusion that the Manual of Surveying Instructions in effect at the time of the 1900 Bonser survey would have been the 1894 version of the Manual of Surveying. There was a previous version of the Manual of Surveying utilized by GLO surveyors (1890), as well as a subsequent version (1902), but all three versions contain similar instructions regarding the location of meander lines.

22. Attached hereto as Exhibit B is a true and correct reprint of excerpts of the 1894 Manual of Surveying utilized for purposes of surveying the public lands of the United States. I am familiar with the instructions attached hereto as Exhibit B and have utilized them for purposes of offering expert opinion as to the location of meander lines on multiple prior occasions.

23. The 1894 Manual of Surveying directed the surveyor to locate the meander line

consistent with the then-existing ordinary mean high water mark which, in Idaho, coincides with the vegetation line. Thus, the existing vegetation line, at the time of the survey, was to form the basis for locating the sinuosity of the shore.

24. Accordingly, while the physical location of the meander line is not in and of itself a boundary, the location of a given meander line on an inland navigable lake has independent historical significance because the GLO surveyor was instructed, on a particular date (in this case, September 7, 1900), to place the meander line where the vegetation line existed.

25. For purposes of this proceeding, although there may be no reliable lake elevation readings prior to 1930, we do know where the GLO surveyor placed the meander line, based upon existing vegetation, on September 7, 1900, ten years after Statehood.

26. Attached hereto as Exhibit C is an exhibit I have prepared for illustrative purposes. Exhibit C consists of an aerial photograph of the portion of Priest Lake including Defendant Hudson's property (shown with an arrow on Exhibit C). This exhibit is offered simply to illustrate the point that the meander line bordering the Hudson parcel is not coexistent with the current summer elevation of the lake. The photograph was obtained from the records of Bonner County. The photograph shows, for general illustrative purposes, the location of the summer level of Priest Lake which is maintained at elevation 2437.64 by the subject dam. Exhibit C also overlays, for general illustrative purposes, the approximate location of the GLO meander line as determined on September 7, 1900 by Robert Bonser. This line is the line paralleling the shore of the subject property some distance out into the lake. Exhibit C is an attempt to illustrate the fact that there is a discernible distance between the summer level of Priest Lake as artificially maintained from July through September at elevation 2437.64 and the location of the meander line as physically



determined by Robert Bonser on September 7, 1900 (who employed a pre-dam vegetation test).

### **OPINIONS AND CONCLUSIONS.**

27. Based upon my professional expertise, knowledge, and experience, coupled with my review and analysis of on-site conditions and the information described and summarized in Paragraph 7 above, I offer the opinions set forth below. I express said opinions on a more probable than not basis.

28. Prior to the operation of the dam, the elevation of Priest Lake generally receded, during the summer growing season (August 1), to an elevation two vertical feet lower than the summer elevation maintained by the dam since 1951.

29. The elevation of Priest Lake, prior to the operation of the dam at the outlet of Priest Lake, generally receded during the growing season (September 1) to an elevation approximately 2.3 vertical feet lower than the level currently maintained by the dam during summer months.

30. The original GLO meander line, as of September 7, 1900, some 50 years prior to construction of the Priest Lake dam, was to be located, pursuant to the Manual of Surveying Instructions then in effect, at the ordinary mean high water mark as evidenced by the vegetation line.

31. The original GLO meander line, although not constituting a boundary line in and of itself, is located in a manner that has independent factual and historical significance in that it evidences a vegetation line at an elevation lower than the artificial summer elevation maintained since 1951.

32. Actual measurements taken and memorialized at lots neighboring the Hudson lot reveal a slope waterward of the Hudson parcel (extending below elevation 2437.64 (the summer elevation)), of approximately one foot of elevation change for each nine and one-half feet of

horizontal distance.

33. By artificially raising the elevation level of Priest Lake during the summer growing season by two vertical feet, the dam has had the effect of raising the lake elevation to cover approximately 19 more feet of the Hudson property, all of which now lies below elevation 2437.64 from July through September.

34. Attached hereto for illustrative purposes is a true and correct copy of Exhibit B to the Affidavit of Mick Schanilec. The slope described in the preceding paragraph can be visually seen in the foreground of Exhibit D (Schanilec Exhibit B).

35. I believe and conclude, based upon the information and opinions expressed herein, that the ordinary high water mark of Priest Lake, as of July 3, 1890, was at least two vertical feet lower than elevation 2437.64 (the artificial level now maintained from July through September) and perhaps as much as 2.3 vertical feet lower.

36. It is my further opinion that most, if not all, of the Hudson improvements depicted on Exhibit D in yellow would be located upland of the ordinary high water mark as located pursuant to my opinion. Further specific on-site measurements, in lower water, will confirm with specificity the extent of any encroachments placed waterward of an OHWM of 2435.64 or lower. Nonetheless, based upon the information described herein, and currently known, nearly all of the improvements depicted on Exhibit D are above the location of the OHWM to which I have opined.

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I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct.

DATED this 7 day of June, 2016.



Ernest M. Warner  
ERNEST M. WARNER

CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of June, 2016, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

ANGELA SCHAEER KAUFMANN  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
P.O. Box 83720  
Boise, ID 83720

X U.S. MAIL  
       E-MAIL TRANSMISSION  
       HAND DELIVERED  
       OVERNIGHT MAIL  
X FACSIMILE - 208\854-8072

HUDSON.DECLARATION WARNER-Clean Copy.wpd

[Signature]

# **EXHIBIT A**



NADA 29

### Daily Average Stage (USGS Gage 12393000)

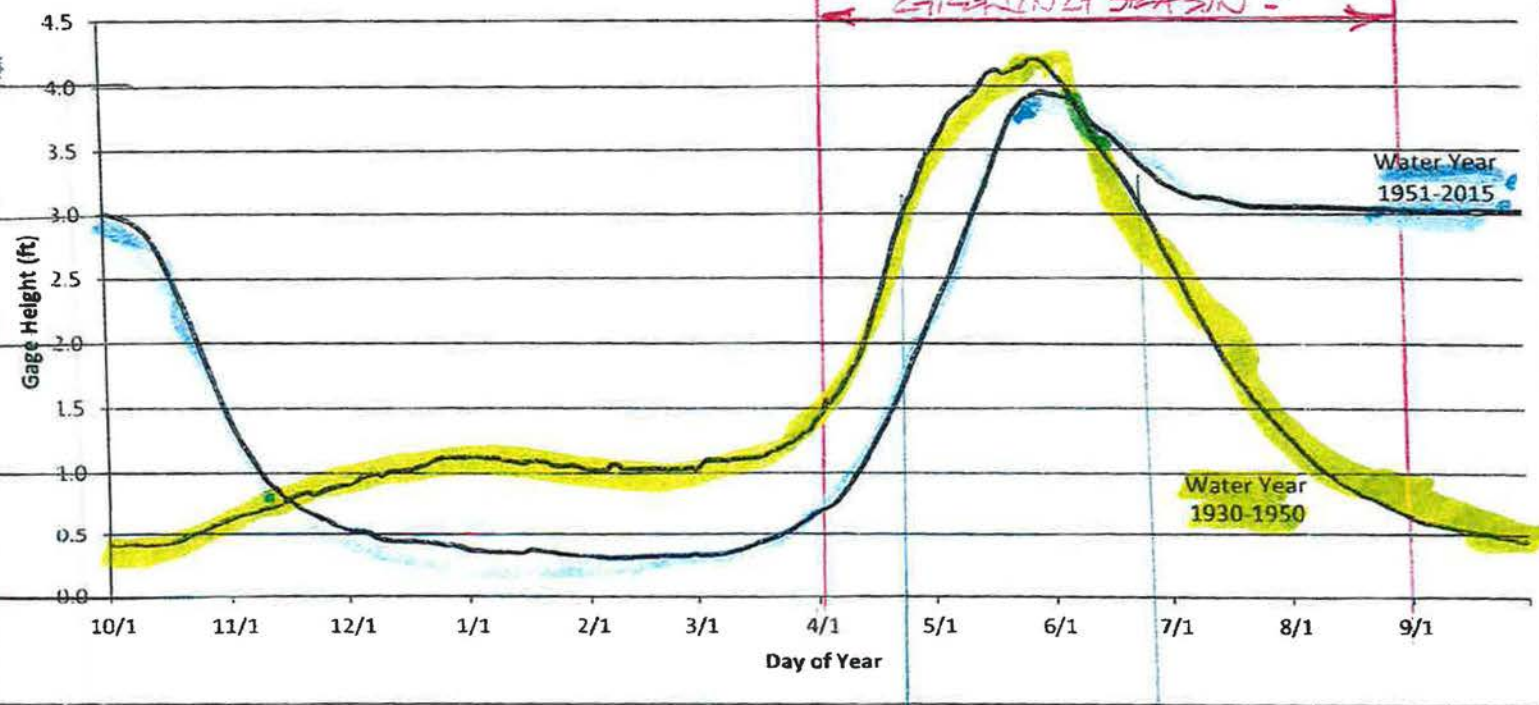


EXHIBIT A

Exhibit E

# **EXHIBIT B**

# A HISTORY OF THE RECTANGULAR SURVEY SYSTEM



by C. Albert White



*is copy of the 1894 Manual is taken from an original volume in the possession of the BLM, Oregon State Office, Portland.)*

**1894  
MANUAL  
OF  
SURVEYING INSTRUCTIONS  
FOR THE  
SURVEY OF THE PUBLIC LANDS  
OF THE  
UNITED STATES  
AND  
PRIVATE LAND CLAIMS.**

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Prepared in conformity with law under the direction of  
THE COMMISSIONER OF THE GENERAL LAND OFFICE.

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JUNE 30, 1894.

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WASHINGTON:  
GOVERNMENT PRINTING OFFICE.  
1894.



tional measurements being thereby thrown into those portions of the lines situated between said quarter section corners and the west boundary of the township.

7. The following general requirements are reiterated for emphasis:

The *random* of a latitudinal section line will always be run parallel to the south boundary of the section to which it belongs, and with the true bearing of said boundary; and when a section has no linear south boundary, the random will be run parallel to the south boundary of the range of sections in which it is situated, and fractional true lines will be run in a similar manner.<sup>47</sup>

8. The deputy is not required to complete the survey of the first range of sections from south to north before commencing the survey of the second or any subsequent range of sections, but the corner on which any random line closes shall have been previously established by running the line which determines its position, except as follows: Where it is impracticable to establish such section corner in the regular manner, it will be established by running the latitudinal section line as a *true line*, with a *true bearing*, determined as above directed for *random* lines, setting the quarter section corner at 40.00 chains and the section corner at 80.00 chains.<sup>48</sup>

9. Quarter section corners, both upon meridional and latitudinal section lines, will be established at points *equidistant* from the corresponding section corners, *except* upon the lines closing on the north and west boundaries of the township, and in those situations the quarter section corners will always be established at precisely *forty chains* to the north or west (as the case may be) of the respective section corners from which those lines respectively *start*, by which procedure the

-56-

excess or deficiency in the measurements will be thrown, according to law, on the extreme tier or range of quarter sections, as the case may be.

10. Where by reason of impassable objects only a portion of the south boundary of a township can be established, an auxiliary base line (or lines,<sup>49</sup> as the case may require) will be run through the portion which has no linear south boundary, first random, then corrected, connecting properly established corresponding section corners (either interior or exterior) and as far south as possible, and from such line or lines, the section lines will be extended northwardly in the usual manner, and any *fraction south* of said line will be surveyed in the opposite direction from the section corners on the auxiliary base thus established. (See Plate I, figs. 3, 4, and 5.)

11. Where by reason of impassable objects *no portion* of the *south boundary* of a township can be regularly established, the subdivision thereof will proceed from *north to south* and from east to west, thereby throwing all fractional measurements and areas against the west boundary, and the meanderable stream or other boundary limiting the township on the south.

If the *east* boundary is without regular section corners and the north boundary has been run eastwardly as a true line, with section corners at regular intervals of 80.00 chains, the subdivision of the township will be made from *west to east*, and fractional measurements and areas will be thrown against the irregular east boundary.

12. When the *proper* point for the establishment of a township or section corner is inaccessible, and a witness corner can be erected upon each of the two lines which approach the same, at distances not exceeding twenty chains therefrom, said witness corners<sup>5</sup> will be properly established, and the half miles upon which they stand will be recognized as *surveyed lines*.

The witness corner will be marked as conspicuously as a section corner, and bearing trees will be used wherever possible.

The deputy will be required to furnish good evidence that the section corner is actually inaccessible.

## MEANDERING.

1. Proceeding *down* stream, the bank on the *left* hand is termed the *left bank* and that on the *right* hand the *right bank*. These terms will be universally used to distinguish the two banks of a river or stream.

2. Navigable rivers, as well as all rivers not embraced in the class denominated "navigable," the right-angle width of which is three chains and upwards, will be meandered on both banks, at the ordinary *mean high water mark*, by taking the general courses and distances of their sinuosities, and the same will be entered in the field book. Rivers not classed as navigable will not be meandered above the point where the average right-angle width is less than three chains. Shallow streams, without any well-defined channel or permanent banks, *will not be meandered*; except tide-water streams, whether more or less than three chains wide, which should be meandered at ordinary high-water mark, as far as tide-water extends.

At every point where either standard, township, or section lines intersect the bank of a navigable stream, or any meanderable line, corners will be established at the time of running these lines. Such corners

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are called meander corners,<sup>50</sup> and the deputy will commence at one of these corners, follow the bank or boundary line, and measure the length of each course from the beginning corner to the next "meander corner." Compass courses, by the needle or solar, will be used in meanders. Transit angles are not allowed.

The crossing distance between meander corners on same line and the true bearing and distance between corresponding meander corners will be ascertained by triangulation, or direct measurement, in order that the river may be projected with entire accuracy. The particulars will be given in the field notes.

5. See "Witness Corners," page 47.

47. See Plate IV, between sections 7 and 18, and 17 and 20.

48. See Plate IV, between sections 8 and 17.

49. Section corners will be established by correct alinement and measurement of meridional sectional lines whenever practicable.

50. These corners are the regular meander corners, and designated "meander corners;" they are distinguished from special and auxiliary meander corners; see paragraphs 11 and 12, page 44, and pages 42 and 43.



In meandering water courses or lakes, where a distance is more than ten chains between successive stations, whole chains only should be taken; but if the distance is less than ten chains, and it is found convenient to employ chains and links, the number of links should be a multiple of ten, thereby saving time and labor in testing the closings, both in the field and office.

3. The meanders of all lakes, navigable bayous, and deep ponds, of the area of twenty-five acres and upwards, will be commenced at a meander corner and continued, as above directed for navigable streams; from said corner, the courses and distances of the entire margin of the same, and the intersections with all meander corners established thereon, will be noted.

All streams falling into the river, lake, or bayou will be noted, and the width at their mouths stated; also, the position, size, and depth of springs, whether the water be pure or mineral; also, the heads and mouths of all bayous; all islands, rapids, and bars will be noted, with intersections, to their upper and lower ends, to establish their exact situation. The elevation of the banks of lakes, bayous, and streams, the height of falls and cascades, and the length and fall of rapids will be recorded in the field notes.

To meander a lake or deep pond lying entirely within the boundaries of a section, two lines will be run from the two nearest corners on different sides of such lake or pond, the courses and length of which will be recorded, and if coincident with unsurveyed lines of legal subdivisions, that fact will also be stated in the field notes, and at each of the points where said lines intersect the margin of the pond or lake, a special<sup>51</sup> meander corner will be established as above directed. (See example, page 201.)

The relative position of these points being thus definitely fixed in the section, the meandering will commence at one of them and be continued to the other, noting the intersection, and thence to the beginning. The proceedings are to be fully entered in the field notes.

4. Meander lines will not be established at the segregation line between dry and swamp or overflowed land, but at the ordinary high-water mark of the actual margin of the rivers or lakes on which such swamp or overflowed lands border.

5. The precise relative position of an island, in a township made fractional by a river or lake in which the island is situated, will be determined by triangulation from a special and carefully measured base line, initiated upon the surveyed lines, on or near the lake or river bank on the main land, so as to connect by course and distance on a direct

lines intersect nigh-water mark, and the meanders will low the high-water line.

8. The field notes of meanders will show the date which the work was performed, as illustrated in the specimen notes, page 216. The field notes of meanders will state describe the corner from which the meanders commenced and upon which they closed, and will exhibit the meander each fractional section separately; following, and comprising a part of such notes, will be given a description of the timber, depth of inundation to which the bottom is submerged, and the banks, current, and bottom of the stream or body of water meandered. The utmost care will be taken to preserve the object of topography, or change therein, without giving particular description thereof in its proper place in the notes of the meanders.

#### SUMMARY OF OBJECTS AND DATA REQUIRED TO BE NOTED.

1. The precise length of every line run, noting all necessary offsets therefrom, with the reason for making them and the method employed.

2. The kind and diameter of all bearing trees, with the course and distance of the same from their respective corners and the precise relative position of witness corners to the corners.

3. The kind of materials of which corners are constructed.

4. Trees on line. The name, diameter, and distance or direction to all trees which it intersects.

5. Intersections by line of land objects. The distance which the line intersects the boundary lines of every reservation, settler's claim, improvement, or rancho; prairie, bottom land, swamp, marsh, grove, and windfall, with the course the same at all points of intersection; also, the distance which the line begins to ascend, arrives at the top, begins to descend, and reaches the foot of all remarkable hills, ridges, with their courses, and estimated height in feet, and the level land of the surrounding country, or above the bottom lands, ravines, or waters near which they are situated. Also, distance to and across large ravines, their depth and course.

6. Intersections by line of water objects. All rivers, creeks, and smaller streams of water which the line crosses, distances measured on the true line to the bank first arrived at, the course down stream at points of intersection, and widths on line. In cases of navigable streams, their width will be ascertained between the meander corners, as set under the proper head.<sup>53</sup>

7. The land's surface—whether level, rolling, broken, hilly, or mountainous.

8. The soil—whether first, second, third, or fourth class.

9. Timber—the several kinds of timber and undergrowth in the order in which they predominate.

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line, the meander corner on the mainland with the corresponding point on the island, where the proper meander corner will be established.

6. In making the connection of an island lying entirely within a section, with the mainland, a special base will be measured from the most convenient meander corner, and from such base, the location of an auxiliary<sup>52</sup> meander corner will be determined by triangulation, at which the meanders of the island will be initiated.

7. In the survey of lands bordering on tide water, "meander corners" will be established at the points where surveyed

51. A "Special Meander Corner" is one established on a line of legal subdivision, township, or section line. See pages 201 and 202.

52. An "auxiliary meander corner" is one not on a line belonging to the system of rectangular surveying. See page 212.

53. See "Meandering," third clause of paragraph 2, page 57.



10. *Bottom lands*—to be described as wet or dry, and if subject to inundation, state to what depth.

11. *Springs of water*—whether fresh, saline, or mineral, with the course of the streams flowing from them.

12. *Lakes and ponds*—describing their banks and giving their height, and also depth of water, and whether it be pure or stagnant.

13. *Improvements*. Towns and villages; houses or cabins, fields, or other improvements with owners' names; mill sites, forges, and factories, mineral monuments, and all corners not belonging to the system of rectangular surveying; will be located by bearing and distance, or by intersecting bearings from given points.

14. *Coal banks or beds; peat or turf grounds; minerals and ores*; with particular description of the same as to quality and extent, and all *diggings* therefor; also *salt* springs and licks. All reliable information that can be obtained respecting these objects, whether they be on the line or not, will appear in the general description.

15. *Roads and trails*, with their directions, whence and whither.

16. *Rapids, cataracts, cascades, or falls of water*, with the estimated height of their fall in feet.

17. *Precipices, caves, sink holes, ravines, stone quarries, ledges of rocks*, with the kind of stone they afford.

18. *Natural curiosities*, interesting fossils, petrifications, organic remains, etc.; also all ancient works of art, such as mounds, fortifications, embankments, ditches, or objects of like nature.

19. The *magnetic declination* will be *incidentally* noted at all points of the lines being surveyed, where any *material change* in the same indicates the probable presence of iron ores; and the position of such points will be perfectly identified in the field notes.

## PREScribed LIMITS FOR CLOSINGS AND LENGTHS OF LINES.

1. If in running a *random* township exterior, such random falls short of or exceeds its proper length by more than *three chains*, or falls more than *three chains* north or south of its objective corner, it will be re-run, and if found correct, so much of the remaining boundaries of the township will be retraced or resurveyed,<sup>54</sup> as may be found *necessary* to locate the error.

2. Every meridional section line, except those terminating in the north boundary of the township, shall be *eighty chains* in length.<sup>55</sup>

3. The *random* meridional section lines through the north tier of sections shall fall within *fifty links* east or west of the section corners established on the north boundary of the township, *except* when closing on a base line or standard parallel.

4. The actual length of meridional section lines through the north tier of sections shall be within *one hundred and fifty links* of their theoretical length. The latter will be determined from the meridional boundaries of the north tier of sections.

5. All *random* latitudinal section lines shall fall within

*fifty links* north or south of their objective section corners.

In any range of sections, the difference between the true bearing of a latitudinal section line and that of the south boundary of the range, shall not exceed 21 minutes of arc.

The *latitudinal* section lines, except those terminating in the west boundary of the township, shall be within *fifty links* of the actual distance established on the south boundary line of the township for the width of the range of sections to which they belong.

6. The north boundary and the south boundary of *any one section*,

except in the extreme western range of sections, shall be within *fifty links* of equal length.

7. The meanders within each fractional section, or between any two successive meander corners, or of an island in the interior of a section, should close within a limit to be determined by allowing *five-eighths of a link for each chain* of said meander line. Where the meander corners marking the ends of a meander line in a fractional section are located on standard, township, or section lines, the above limit, increased by *one fourth of the regular perimeter of the fractional section, expressed in miles, multiplied by 71 links, will be allowed*.<sup>56</sup>

The extreme limit, however, will in no case be permitted to exceed *one hundred and fifty links*.

## FIELD NOTES.

1. The proper blank books for *original field notes* will be furnished by the surveyor general, and in such books the deputy surveyor will make a faithful, distinct, and minute record of everything done and observed by himself and his assistants, pursuant to instructions, in relation to running, measuring, and marking lines, establishing corners, etc., and present, as far as possible, full and complete topographical sketches of all standard and exterior lines, drawn to the usual scale for township exteriors. These "original field notes" are not necessarily the entries made in the field, in the deputy's pocket notebooks called tablets; but they are to be fully and correctly written out in ink, from such tablets, for the permanent record of the work. Tablets should be so fully written as to verify the "original field notes" whenever the surveyor general requires them for inspection.

2. A full description of all corners belonging to old surveys, from which the lines of *new* surveys start, or upon which they close, will in all cases be furnished the deputy from the surveyor general's office, when authority is given for commencing work; then, if the old corners are found to agree with said descriptions, the deputy will describe any one of them in this form, "which is a stone firmly set, marked, and witnessed, as described by the surveyor general"; but, should a corner *not* answer the description supplied, the deputy will give a *full description* of such corner and its accessories, following the proper approved form given in these instructions.

54. See "Explanations," p. 71 to 78.

55. See exception on p. 76.

56. See Plate I, figs. 8, 9, 10, 11, and 12.

# **EXHIBIT C**







# **EXHIBIT D**

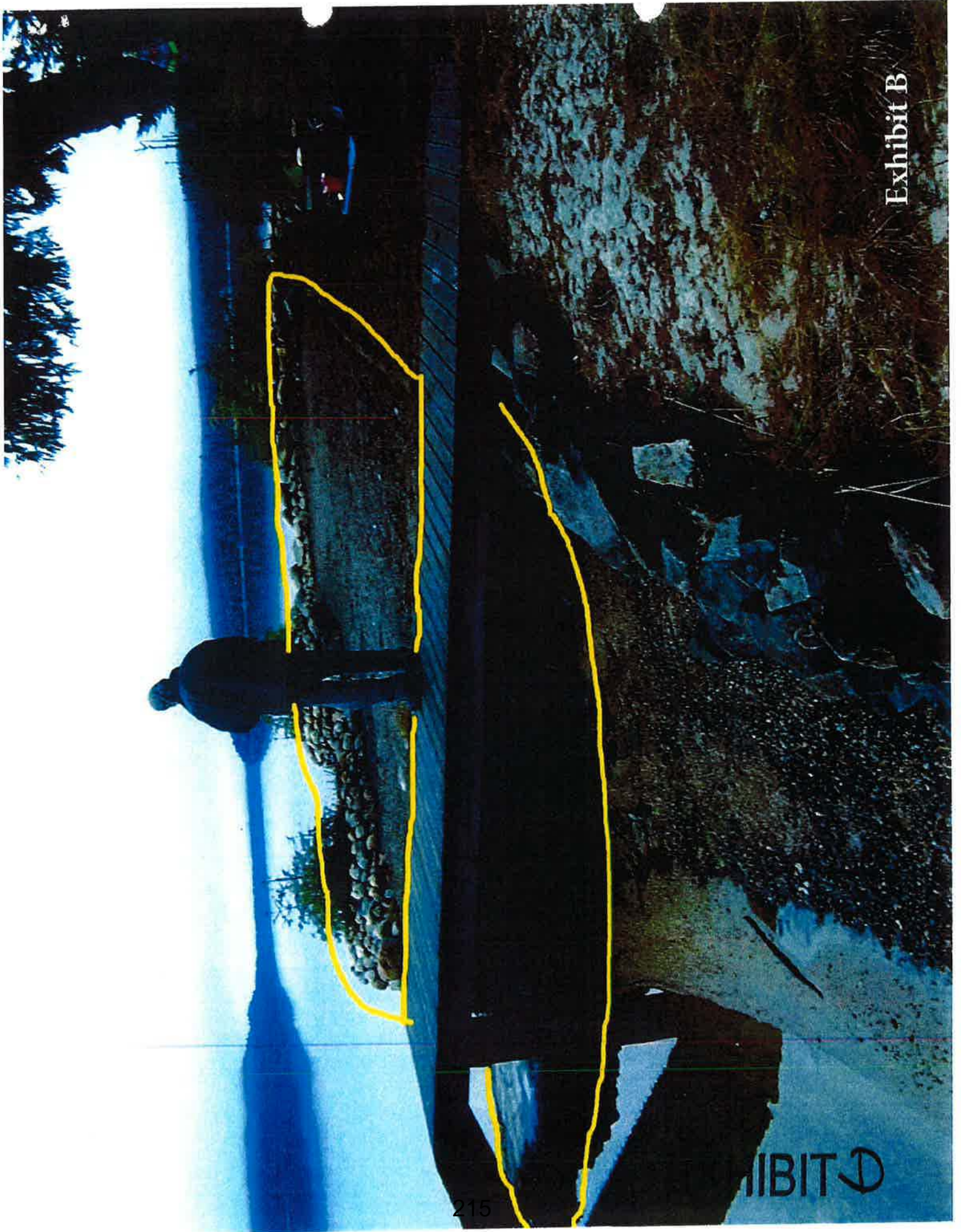


Exhibit B

EXHIBIT D



JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

Attorney for Defendant/Counterclaim  
Plaintiff Philip Hudson



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

---

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Counterclaim Defendants.

NO. CV-15-1075

**DECLARATION OF  
DREW C. DITTMAN, P.E.**

My name is DREW C. DITTMAN, P.E., and I make this Declaration upon my own personal  
knowledge and belief.



1. I am over the age of eighteen, have personal knowledge of the matters set forth herein, and am otherwise competent to testify thereto.

2. I was engaged by Dr. Philip Hudson to evaluate conditions near the waterfront of his property on Priest Lake and to provide a recommended course of action with respect to a July 17, 2014 letter to Dr. Hudson from Carl Ritchie of the Idaho Department of Lands ("IDL").

3. I am licensed as a professional engineer by the State of Idaho (License No. 11138). I have been so licensed for twelve (12) years. I am the owner and principal of Lake City Engineering in Coeur d'Alene, Idaho.

4. I inspected and measured the location and extent of encroachments at or near the shoreline of the Hudson property. I was also able to locate the summer pool elevation line impressed on the shoreline.

5. A true and correct copy of my recommended course of responsive action is attached hereto as Exhibit A. I incorporate Exhibit A herein as though set forth in full.

6. Based upon my observations, if the boundary line between the Hudson parcel and the State-owned bed of Priest Lake was extended nineteen (19) feet waterward of the summer pool level maintained on Priest Lake, then most if not all of Mr. Hudson's improvements would be located on his property as opposed to the property of the State of Idaho.

I certify under penalty of perjury pursuant to the laws of the State of Idaho that the foregoing is true and correct.

DATED this 8<sup>TH</sup> day of June, 2016.

  
\_\_\_\_\_  
DREW C. DITTMAN, P.E.

CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of June, 2016, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Angela Schaer Kaufmann, Esq.  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
P.O. Box 83720  
Boise, ID 83720

X U.S. MAIL  
X E-MAIL TRANSMISSION  
       HAND DELIVERED  
       OVERNIGHT MAIL  
       FACSIMILE - 208\854-8072



HUDSON-DITTMAN.DEC.wpd

# **EXHIBIT A**

John F. Magnuson  
Attorney at Law  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, Idaho 83816

February 25, 2015



**RE: Hudson Residence – Priest Lake, Idaho  
Lot 29 Sandy Shores**

Dear Mr. Magnuson:

At your request, I have performed a thorough investigation of the Hudson residence as it relates to the lakebed encroachment claims made by the Idaho Department of Lands in its letter of July 17, 2014 to Dr. Hudson. This letter contains my professional observations and opinions.

I offer the following background information on the hydrology of Priest Lake. The water level in Priest Lake is artificially controlled by the Priest Lake Dam. This dam was constructed in 1978 and is used primarily for hydroelectric power generation and recreational control of Priest Lake. The dam itself is a relatively small concrete gravity dam approximately 8' in height and is operated by the Avista Corporation. Lake levels can fluctuate as much as 4' feet during winter drawdown. The summer pool elevation of Priest Lake is 2,437.8 and is measured by a gauge (USGS 1239300) located at the South end of the lake near Coolin, Idaho. Instantaneous gauge readings as well as historic measurements at this location are readily available on the USGS website.

Prior to visiting the site, I inquired at length of Dr. Phil Hudson regarding his situation and the history and characteristics of his beach-front property. The property in question is located in Huckleberry Bay of Priest Lake and has a physical address of 630 South Shores Road, Coolin, Idaho 83821. The property is legally described as Lot 29 of South Shores Addition. Dr. and Mrs. Hudson acquired the property in 1996, and installed the dock shortly thereafter. At this time, the community of South Shores consisted of approximately 45 unimproved lots with lake access and frontage. As these lots were sold over the years, individual homeowners separately developed their own portions of shoreline and improved their respective beach frontage. The majority of the South Shores lots were very similar to Dr. Hudson's lot in that they consisted of fairly steep slopes and rocky shorelines.

During the next several years, Dr. Hudson and his family improved his shoreline by creating a beach and seawall. He informed me that this shoreline is prone to suffering damage from the intense storms that move in quickly from the North. In an effort to

**EXHIBIT A**



provide stability and to prevent erosion to the shoreline, Dr. Hudson placed a seawall upland of the Lake's pre-dam ordinary level, which he reinforced with sack-mix concrete, sand and rocks. Dr. Hudson expressed to me his concerns that he had only sought to improve the shoreline to prevent further erosion and destruction of his property. He also conveyed to me that all of these improvements were done "by hand" and with no mechanical equipment.

On October 25, 2014, I visited the site and performed an inspection of the shoreline of Dr. Hudson's property and the adjoining neighbors. According to the USGS website, the elevation of Priest Lake on the day of my visit was 2,435.8, approximately 2' below summer pool level. With the water level being below summer pool, I was able to examine the improvements on the Hudson property in full detail. My investigations confirmed exactly what Dr. Hudson had previously informed me about the steep slopes, rocky shorelines and minimal access to the South Shores community. I walked the shoreline in both directions from the Hudson residence and noticed that several of the frontages contained man-made seawalls, beaches and other improvements that benefitted the homeowners and could potentially be considered to constitute encroachments.

There are several man-made seawalls on the Hudson property that consist of large rocks and boulders hand-stacked together, secured with concrete/mortar mix, and backfilled with sand and gravel. The seawalls vary in height from 2' to 5', and are substantial in structure and mass. They appear to be very stable, and exhibit minimal or no signs of erosive activity. The area upland and adjacent to the seawall contains sand and gravel and is well-maintained. This upland area does not exhibit any signs of erosive activity. I have attached several photographs that I took during my site visit for reference.

It is my understanding that the Idaho Department of Lands has determined that the improvements created by Dr. Hudson along the shoreline are an encroachment into the lake bed and that he should submit a responsive correction plan addressing the possibility of removal of the encroachments.

I will not render an opinion as to whether or not the improvements created by Dr. Hudson area in fact are a violation of the Lake Protection Act, as that is beyond my expertise. However, it is my professional opinion that the removal of the seawalls in question will result in substantial and significant environmental disruption and damage to the shoreline, both above and below the summer pool level. It would also potentially result in extensive damage to the upland portion of the Hudson property.

Although the structures were built by hand, demolition of the walls would require the use of heavy equipment such as a large backhoe or track mounted excavator. The amount of concrete and mortar used to build the walls, and the sheer mass of the walls alone would necessitate the use of this type of heavy equipment, not only for demolition but for removal of the material from the site as well. The use of this machinery would cause greater environmental damage and impact to the shoreline and could potentially pose a significant environmental risk operating within close proximity to the water. It is important to note that the reason the seawalls and beaches were built by hand and without mechanical equipment is due to the lack of adequate access to the shoreline. The property is heavily treed and contains steep slopes. The mobilization of such heavy equipment to the shoreline would be near impossible without causing major disturbance to the upland and native vegetation and the potential removal of trees, consequently creating more unnecessary erosion, and this assumes that temporary construction easements could be negotiated with neighboring property owners. The other option would be to float a piece of equipment in via barge. This also has the potential to cause unnecessary disturbances and damage to the shoreline below the water level as the barge would ultimately need to dock and stabilize so that the equipment could be mobilized. This method may well be cost prohibitive.

My professional recommendation would be to leave the seawall and beaches on the Hudson property in their current condition and configuration as they have been properly constructed and have served their intended purpose of stabilizing the shore from erosive action. There is also a significant question as to whether the encroachment is located below the "ordinary" (pre-dam) high water mark, but again, this is a legal question beyond my expertise. Thank you for your time and consideration in this matter.

Regards,

Drew C. Dittman, PE  
Principal



2/25/15

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

CLIVE J. STRONG  
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

---

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Counterclaim Defendants.

Case No. CV 2015-1075

**MOTION TO STRIKE  
PORTIONS OF THE  
DECLARATION OF ERNEST  
M. WARNER, PLS AND  
MEMORANDUM IN SUPPORT**



The State of Idaho, the Idaho State Board of Land Commissioners and the Idaho Department of Lands (collectively referred to as “State”), by and through their attorneys of record, hereby submits this *Motion to Strike Portions of the Declaration of Ernest M. Warner, PLS and Memorandum in Support*.

Pursuant to I.R.C.P. 56(e), affidavits or declarations in support of or in opposition to summary judgment “shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 13, 175 P.3d 172, 175 (2007) (additional citations omitted). Thus, statements in affidavits or declarations must meet the evidentiary standards set forth in the Idaho Rules of Evidence. In addition, “[t]he admissibility of the evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial. *Id.* (Additional citations omitted).

**A. Mr. Warner Has Not Demonstrated That He Is Competent To Testify As to the Location of the Ordinary High Water Mark of Priest Lake, Nor Is His Testimony On That Issue Otherwise Admissible.**

At several points in his Declaration, Mr. Warner offers testimony about the ordinary high water mark (“OHWM”) (or what he terms the “summer elevation”) of Priest Lake. Declaration of Ernest M. Warner, PLS (“Warner Dec.”), ¶¶ 9-16, 28-30; 33; 35 and 36. It is unclear whether Mr. Warner is offering his opinion testimony regarding the OHWM as a lay witness or an expert witness, but his testimony is inadmissible regardless.



Idaho Rule of Evidence 701 provides that a lay witness may offer opinion testimony only if it is “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.” I.R.E. 701. Paragraphs 9-16, 28, 29, 33 and 35 set forth Mr. Warner’s interpretation of the Affidavit of Matthew Anders (“Anders Aff.”), and Mr. Warner’s apparently resulting opinion about the location of the Priest Lake OWHM. First, Paragraphs 12, 13, 14, 15 and 16, in particular, merely recite, quote or summarize the Anders Affidavit and Exhibits thereto. The Anders Affidavit speaks for itself, and the just-listed paragraphs are thus simply unhelpful to the trier of fact and should be stricken.

Second, to the extent that those paragraphs are the lay opinion of Mr. Warner, they are not rationally based on his own perception of anything other than the Anders Affidavit. As such, they are inadmissible, particularly given that the Declaration does not contain any indication that Mr. Warner reviewed the approximately 508 pages of data provided on the CD that was part of Exhibit B to the Anders Affidavit, and that formed part of the basis of Mr. Anders’ opinion. *See, e.g. State v. Johnson*, 119 Idaho 852, 858, 810 P.2d 1138, 1144 (Ct. App. 1991) (holding that a witness’s lay opinion testimony that was based solely on what others had related to him was inadmissible).

To the extent that Mr. Warner is attempting to testify as an expert witness, he has not demonstrated that he is competent to testify as an expert witness regarding the OWHM, AHW, or lake elevation of Priest Lake. In order to testify as an expert witness, one must demonstrate that he or she has the necessary “knowledge, skill, experience, training or education” to testify regarding a particular fact in issue. I.R.E. 702. While Mr. Warner is a

Professional Land Surveyor (“PLS”), and is therefore licensed in Idaho to carry out the surveying services defined in Idaho Code § 54-1202(11)(a), he has not shown that he is a hydrologist, nor has he demonstrated that he has the expertise necessary to interpret gage data or other information relevant to determining the OHWM or AHWL.

Mr. Warner states that he offered testimony on the establishment of the OHWM in *Erickson v. State*, 132 Idaho 208, 970 P.2d 1 (1998), but he does not state whether the testimony was accepted into evidence, nor does he even state on whose behalf the testimony was offered. Given that Mr. Hudson’s counsel represented the Ericksons in that case, one could conclude that Mr. Warner’s testimony was offered on their behalf. If so, it is noteworthy that the Idaho Supreme Court found the Erickson’s evidence insufficient to establish the OHWM at Lake Coeur d’Alene. *See id.*, 132 Idaho at 211, 970 P.2d at 4.

Similarly, Mr. Warner asserts that he “provided consultation and expert opinion by way of affidavit in In Re: Sanders Beach, 143 Idaho 443, 147 P.3d 75 (2006).” Warner Dec., ¶5. Mr. Warner does not specify the nature of his testimony, on whose behalf he testified, the topics on which he testified, or whether his testimony was actually admitted into evidence. The fact that he offered some type of expert testimony in an underlying case does not provide the foundation necessary to demonstrate that Mr. Warner is competent to testify as to the OHWM of Priest Lake.

Mr. Warner cannot testify as to the location of the ordinary high water mark of Priest because there is no foundation to support this testimony. Pursuant to I.R.E. 602, “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” There is no foundational evidence, other than citations to the Affidavit of Matthew Anders (previously filed on behalf of the State in this



matter) to support that Mr. Warner has personal knowledge of the ordinary high water mark of Priest Lake. The definition of the “natural or ordinary high water mark” is set forth in Idaho Code § 58-109(9), but there is no evidence as to whether Mr. Warner has any knowledge of this definition.

For those reasons, the State respectfully requests that Paragraphs 9-16, 28-30; 33; 35 and 36 of the Warner Declaration be stricken.

**B. Paragraph 14 and Exhibit A Are Inadmissible and Should be Stricken.**

In Paragraph 14 of his Declaration, Mr. Warner admits that he placed “interlineations” on the Exhibit E to the Anders Affidavit, and made it Exhibit A to his own declaration. Exhibit A includes two purple vertical lines with “growing season” and an arrow written between them, and two vertical blue lines of unknown purpose. Mr. Warner does not provide the basis for the dates he uses for the growing season, nor has he demonstrated that he is competent to testify about the growing season in the Priest Lake area. In addition, he offers no testimony about the vertical blue lines, including their foundation and their significance. Paragraph 14 and Exhibit A lack foundation, are inadmissible, and should be stricken.

**C. Paragraphs 23, 24, 25, 26, 30, and 31 Are Inadmissible And Should Be Stricken.**

In the just-listed paragraphs, Mr. Warner offers testimony regarding the meander lines and what he alleges is their relationship to Priest Lake’s OHWM. In the Erickson case, the Idaho Supreme Court has held that meander lines cannot be used to establish a lake’s OHWM:

The only significant evidence of specific water levels presented by the Ericksons included the federal government survey and the evidence of dead tree stumps. Meander lines are lines established by the government survey. They are “survey lines drawn along the banks of navigable streams for the purposes of defining the sinuosities of the banks of the stream, and as the means of ascertaining the price to be paid by the purchaser to the government.” *Heckman*, 99 Idaho at 796, 589 P.2d at 543. It is well established that “meander lines established by surveys of public lands bordering on navigable rivers or streams are not boundary lines,

rather the river or stream forms the boundary line.” *Id. Therefore, the meander lines cannot be used to establish the OHWM.*

*Erickson*, 132 Idaho at 212, 970 P.2d at 5.

Even absent the Idaho Supreme Court’s holding, the Warner Declaration paragraphs listed above are inadmissible due to lack of foundation. First, in Paragraph 20, Mr. Warner offers testimony about Mr. Bonser’s survey of what represented to be the Hudson property, but he has not included a copy of the survey. Second, in Paragraphs 23-25, Mr. Warner reaches the conclusion that because the 1894 Manual of Surveying directed surveyors to use the then-existing OHWM to establish the meander line, and because Idaho uses the vegetation line (at least in part) to establish the OHWM, Mr. Bonser used the vegetation line to establish the meander line. However, there is no evidence in the record to date showing that Mr. Bonser in fact used vegetation in establishing the meander line. In fact, there is no evidence in the record to date about the measurements Mr. Bonser took as part of his survey, nor the methodology that he in fact used. Simply stated, paragraphs 23-25 and 30-31 draw conclusions by making significant leaps rather than demonstrating a factual basis, and should be stricken.

Paragraph 26 and Exhibit C should be stricken because there is no evidence of the source of the meander lines that Mr. Warner utilized, the methods he used to place the meander lines on the map, or their accuracy. There is also no foundation for his contention that the photo shows the summer elevation. Mr. Warner does not state when he obtained the photograph, and the image itself is undated, with no evidence as to the time of year that it was actually taken. Finally, by his own admission, the photo is illustrative only, not evidence. Paragraph 26 and Exhibit C lack foundation and are unhelpful to the trier of fact, and should be stricken.

**D. Paragraph 32 of the Warner Affidavit Lacks Foundation and Should be Stricken.**

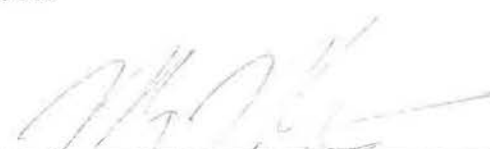


In Paragraph 32 of his Declaration, Mr. Warner testifies about measurements and slope of lots neighboring Mr. Hudsons. First, he does not specify upon which lots the measurements were taken, who took the measurements, or the methodology used in taking the measurements. Moreover, he does not provide the measurements themselves. There is no foundation for his testimony about the slope of neighboring lots, and that portion of Paragraph 32 should be stricken. Second, there is no evidence that Mr. Hudson's lot has a slope similar to that of any of the neighboring lots, rendering Paragraph 32 of no relevance to this matter, and the entirety of Paragraph 32 should be stricken on that basis.

### CONCLUSION

Paragraphs 9-16, 23-26, 28-33, and 35-36, as well as Exhibits A and C of the Warner Declaration are inadmissible for the reasons set forth herein. Therefore, the State respectfully requests that the court grant the Motion to Strike in its entirety.

DATED this 14th day of June, 2016.


  
ANGELA SCHAER KAUFMANN  
Deputy Attorney General  
Idaho Department of Lands

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of June, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

JOHN MAGNUSON  
1250 NORTHWOOD CENTER CT STE A  
COEUR D'ALENE ID 83816

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivery
- ☒ Federal Express
- ☐ Facsimile: (208) 667-0500
- ☒ E-Mail:

  
for. ANGELA SCHAER KAUFMANN  
Deputy Attorney General  
Idaho Department of Lands

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division

ANGELA SCHAEER KAUFMANN, ISB # 5436  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
PO Box 83720  
Boise, ID 83720-0010  
Tele: (208) 334-4120  
FAX: (208) 854-8072

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DISTRICT  
2016 JUN 15 A 10:25  
CLERK DISTRICT COURT  
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Counterclaim Defendants.

Case No. CV 2015-1075

SECOND AFFIDAVIT OF  
MICK SCHANILEC

I, MICK SCHANILEC, being first duly sworn upon oath, depose and state as follows:

1. I am the Area Manager for the Priest Lake Supervisory Area for the Idaho Department of Lands ("IDL") at Coolin, Idaho, and have been employed in this position for 13 years. Prior to being the Area Manager, I held various positions for IDL at Priest Lake starting in 1985. This has included 3 seasons of temporary forestry work, 4 years as Resource Manager (Cottage Sites/Navigable Waters), 11 years as Resource Manager Senior (Forestry) and 1 year as Resource Supervisor (Forestry). My cumulative resource management experience with IDL at Priest Lake exceeds 30 years.

2. I obtained a Bachelor of Science Degree in Forest Resource Management from the University of Montana in 1985.

3. The statements in this Affidavit are based upon my personal knowledge.

4. Appended hereto as Exhibits B, C and D are true and correct color copies of the materials which were included as Exhibits B, C and D to the Affidavit of Mick Schanilec ("Schanilec Affidavit"), previously filed in this matter. The copies attached to my first Schanilec Affidavit were in black and white. The last page of Exhibit D is unavailable in color.

5. As set forth in my first Affidavit, Carl Ritchie, an IDL Senior Resource Specialist, Lands, Minerals and Range, and I visited the Hudson shoreline area on March 26, 2015. Based upon my personal knowledge and experience, the water level at Priest Lake was low on March 26, 2015, and below 2437.64 msl.

6. Appended hereto as Exhibit E is a true and correct copy of a photograph taken by me at the Hudson shoreline area on March 26, 2015. The photograph was taken looking in a northerly direction. The dock shown in Exhibit E is the dock which is permitted under Lake Encroachment Permit L-97-S-983 (Schanilec Aff., Ex. A) ("Encroachment Permit"). The person



depicted in Exhibit E is Carl Ritchie, an IDL Senior Resource Specialist, Lands, Minerals and Range. Mr. Ritchie is standing upon that portion of Mr. Hudson's dock which is designated as "Dock D" on page 7 of the Encroachment Permit. *Id.* The fill which is the subject of the above-referenced litigation ("subject Hudson fill") is the area lying to the north of the dock. This photo is a fair and accurate depiction of the conditions existing at the Hudson shoreline area on March 26, 2015.

7. Appended hereto as Exhibit F is a true and correct copy of a photograph taken by me at the Hudson shoreline area on March 26, 2015. This photograph was taken in a northerly direction, and I was standing on shore south of the point at which I took Exhibit E. Just to the south of the dock is a seawall that has been constructed in the shoreline area of Priest Lake and upland property. This seawall is a minor seawall appears to lie at or very near the high water mark of Priest Lake, and for which IDL could issue an encroachment permit. The dock and the subject Hudson fill lie in the upper or northerly part of the picture, with the subject Hudson fill extending far waterward of the fill in the foreground. This photo is a fair and accurate depiction of the conditions existing at the Hudson shoreline area on March 26, 2015.

8. Appended hereto as Exhibit G is a true and correct copy of a photograph taken by me at the Hudson shoreline area on March 26, 2015. This photograph was taken in a northerly direction, and I was standing on shore south of the point at which I took Exhibits E and F. The photograph depicts another minor seawall lying south of the dock, and of the seawall depicted in Exhibit F. The dock and the subject Hudson fill are lying in the northerly or upper part of the photograph. The portion of the dock that slopes downward toward the water, just waterward of where Mr. Ritchie is standing, corresponds to "Dock C" on page 7 of the Encroachment Permit, and is also depicted on the schematic drawing at page 8 of the Encroachment Permit (Schanilec

Aff., Ex. A). The portion of the dock lying between the lower end of the ramp and the most westerly post in the photograph corresponds to "Dock B" on page 7 of the Encroachment Permit, and is also depicted on the schematic drawing at page 8 of the Encroachment Permit (Schanilec Aff., Ex. A). This photo is a fair and accurate depiction of the conditions existing at the Hudson shoreline area on March 26, 2015.

9. Appended hereto as Exhibit H is a true and correct copy of a photograph taken by me at the Hudson shoreline area on March 26, 2015. I took the photograph while standing on or near the northern edge of the subject Hudson fill, looking south to the Hudson dock and beyond. The minor seawall depicted in Exhibit F lies just to the south of the dock. This photo is a fair and accurate depiction of the conditions existing at the Hudson shoreline area on March 26, 2015.

10. Appended hereto as Exhibit I is a true and correct copy of a photograph taken by me at the Hudson shoreline area on March 26, 2015. I took the photograph while standing north of the subject Hudson fill, looking south and slightly to the west. The photograph shows that concrete and rocks have been placed waterward of the shoreline. This photograph also shows a minor seawall lying just to the north of the subject Hudson fill. This minor seawall appears to lie at or very near the high water mark of Priest Lake, and is one for which IDL could issue a permit. This photo is a fair and accurate depiction of the conditions existing at the Hudson shoreline area on March 26, 2015.

11. Appended hereto as Exhibit J is a true and correct copy of a photograph taken by me at the Hudson shoreline area on March 26, 2016. I took the photograph while standing north of the subject Hudson fill, and to the north of the location at which I took Exhibit I. This photo

is a fair and accurate depiction of the conditions existing at the Hudson shoreline area on March 26, 2015.

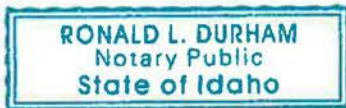
12. I am familiar with the shoreline of Priest Lake in the vicinity of Mr. Hudson's property. I am not aware of any seawalls or fills in the vicinity of Mr. Hudson's property that extend as far waterward as the subject Hudson fill.

DATED this 13<sup>th</sup> day of June, 2016.



MICK SCHANILEC  
Area Manager, Priest Lake  
Idaho Department of Lands

SUBSCRIBED AND SWORN before me this 13<sup>th</sup> day of June, 2016.



Notary Public for Idaho

Residing at: Cocon

My Commission expires: August 3, 2018


**CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of June, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

JOHN MAGNUSON  
1250 NORTHWOOD CENTER CT STE A  
COEUR D'ALENE ID 83816

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivery
- ☒ Federal Express
- ☐ Facsimile: (208) 667-0500
- ☒ E-Mail:

for:

  
ANGELA SCHAEER KAUFMANN  
Deputy Attorney General  
Idaho Department of Lands











**PRIEST LAKE  
SUPERVISORY AREA**  
4053 Cavanaugh Bay Rd  
Coolin ID 83821  
Phone (208) 443-2516  
Fax (208) 443-2162



**TOM SCHULTZ, DIRECTOR**  
*An equal opportunity employer*

**STATE BOARD OF LAND COMMISSIONERS**  
*C. L. "Butch" Otter, Governor*  
*Ben Ysursa, Secretary of State*  
*Lawrence G. Wasden, Attorney General*  
*Brandon D. Woolf, State Controller*  
*Tom Luna, Sup't of Public Instruction*

July 17, 2014

CERTIFIED

Philip Hudson  
E. 4606 Lane Park Rd.  
Mead, WA 99021

Re: Unapproved Artificial Fill Below the Ordinary High Water Mark, Priest Lake

Dear Mr. Hudson:

A few weeks ago while performing navigation/encroachment permit work on Priest Lake I noticed your lot 29 at Sandy Shores appeared to have an elevated beach retained with a sea wall. After reviewing our aerial photo records and other aerial photos from Google earth there appears to be an artificially filled area lakeward from the ordinary high water mark. The filled area as it appears on a Google earth photo September 6, 2012 is approximately 35 feet N-S X 22 feet E-W at the widest point. This extends northward along the shoreline from the north side of your dock's approach.

Enclosed is a series of aerial photos starting in 1998. In 1998 the dock was in place having been permitted in 1997 (L-97-S-983) and there is no evidence of any lakebed filling from the ordinary high water mark. The next aerial photo from 2004 taken after the residence on lot 29, Sandy Shores was built shows lakebed fill. In 2012, the aerial photo shows lakebed fill and a sea wall in better detail.

From these aerial photos it is evidence that the artificial fill over the lakebed and below the ordinary high water mark has occurred after the Lake Protection Act of 1974. You have 30 days from the date of this letter to submit a plan for your deeded lot 29, South Shores, addressing the removal of all fill over the lakebed that is below the ordinary high water mark, Priest Lake. An on-site visit by this office is necessary.

**Exhibit D**

If you have any questions, please contact me at [critchie@idl.idaho.gov](mailto:critchie@idl.idaho.gov) or (208) 443-2516 Monday – Friday between 8:00AM and 4:30PM (PDT). A site visit can be scheduled

Sincerely,

Carl Ritchie  
Lands Coordinator/Nav Waters  
Priest Lake

Enclosure

cc: File

7008 1300 0000 7455 7092

U.S. Postal Service	
CERTIFIED MAIL RECEIPT	
(Domestic Mail Only; No Insurance Coverage Provided)	
For delivery information visit our website at <a href="http://www.usps.com">www.usps.com</a>	
OFFICIAL USE	
Postage	\$ 0.70
Certified Fee	3.30
Return Receipt Fee (Endorsement Required)	2.70
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$ 6.70
Postmark Here	
Sent To	
Philip Hudson	
Street, Apt. No., or PO Box No. E 4606 Lane Park Rd	
City, State, ZIP+4 Mead WA 99021	
PS Form 3800, August 2006 See Reverse for Instructions	

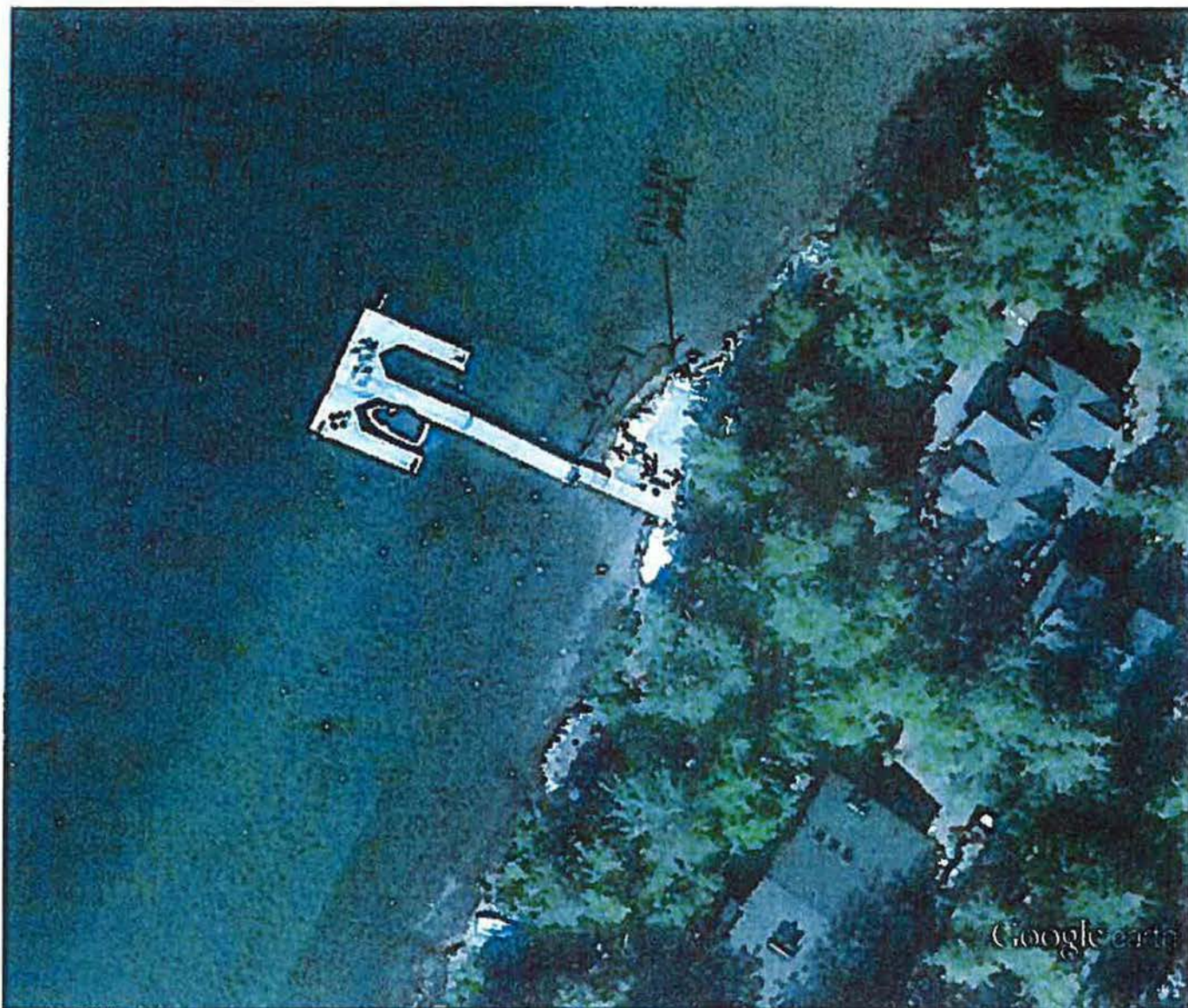
SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"><li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li><li>Print your name and address on the reverse so that we can return the card to you.</li><li>Attach this card to the back of the mailpiece, or on the front if space permits.</li></ul>	<p>A. Signature <i>Philip Hudson</i> <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) _____</p> <p>C. Date of Delivery <i>7/21</i></p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p> <p>3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>
1. Article Addressed to: Philip Hudson E 4606 Lane Park Rd Mead WA 99021	
2. Article Number (Transfer from service label)	7008 1300 0000 7455 7092

PS Form 3811, February 2004

Domestic Return Receipt

102535-02-M-1540





Google earth

feet 100  
meters 50



*PHOTO FROM  
9/6/2012*





9/6/2012

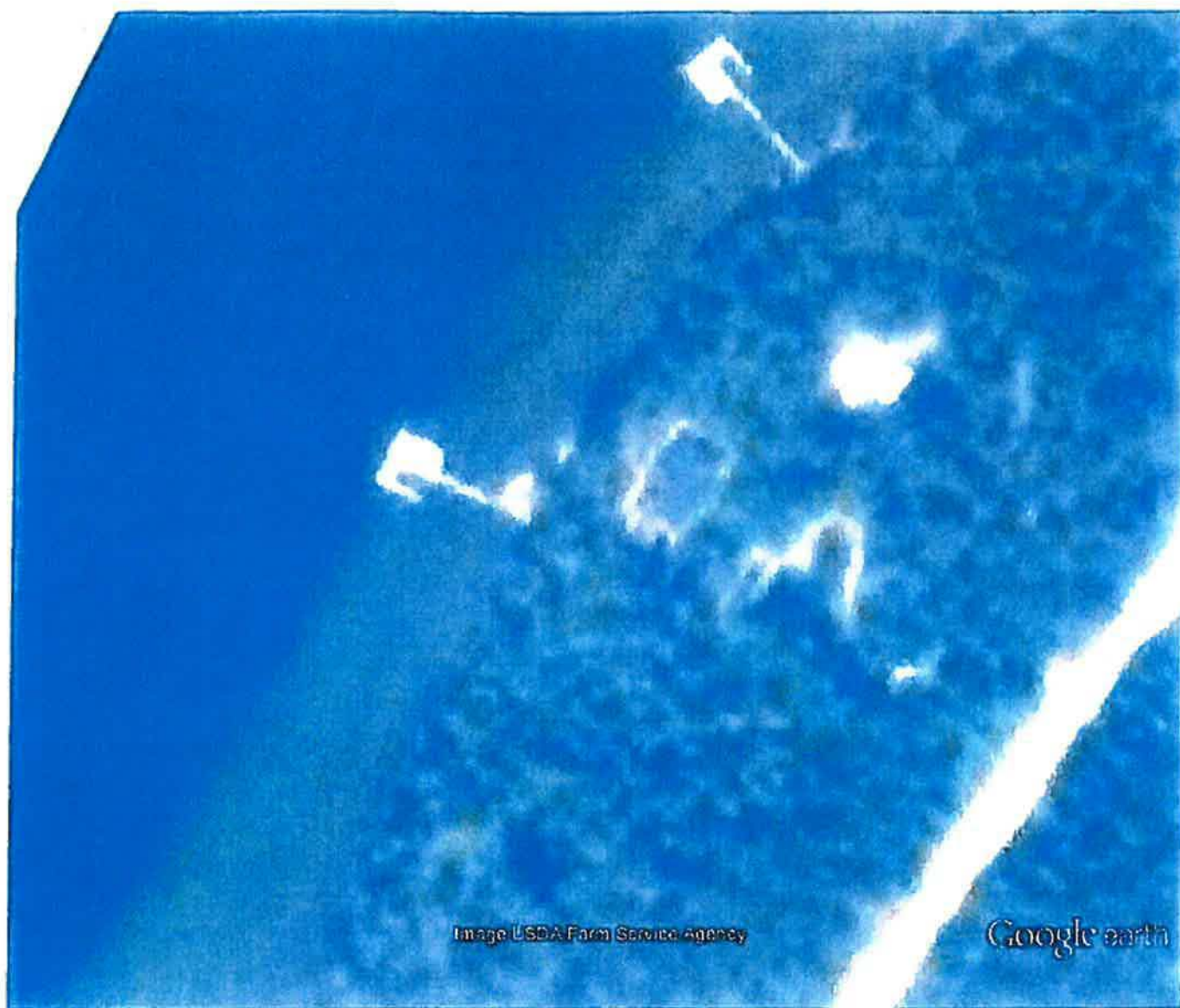


Image USDA Farm Service Agency

Google earth

Google earth

feet 300  
meters 100



9/26/2004





Google earth

feet 300  
meters 100



8/10/1998









Exhibit F









Exhibit H





Exhibit I





Exhibit J



JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

Attorney for Defendant/Counterclaim  
Plaintiff Philip Hudson

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DISTRICT  
JUN 17 A 10:24  
CLERK DISTRICT COURT  
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

---

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Counterclaim Defendants.

NO. CV-15-1075

**MOTION TO STRIKE THE  
"SECOND AFFIDAVIT OF MICK  
SCHANILEC" (FILED BY THE  
PLAINTIFF ON JUNE 15, 2016)**

COMES NOW Defendant/Counterclaim Plaintiff Philip Hudson, by and through his attorney of record, John F. Magnuson, and respectfully moves the Court for entry of an Order striking the "Second Affidavit of Mick Schanilec," which the Plaintiff caused to be filed on June 15, 2016.

This Motion is made pursuant to IRCP 56(c).

ORAL ARGUMENT IS REQUESTED.

DATED this 16<sup>th</sup> day of June, 2016.


  
\_\_\_\_\_  
JOHN F. MAGNUSON  
Attorney for Defendant/Counterclaim Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 16<sup>th</sup> day of June, 2016, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Angela Schaer Kaufmann, Esq.  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
P.O. Box 83720  
Boise, ID 83720

  X   U.S. MAIL  
       E-MAIL TRANSMISSION  
       HAND DELIVERED  
       OVERNIGHT MAIL  
  X   FACSIMILE - 208\854-8072

  
\_\_\_\_\_

HUDSON-STRIKE.MOT.wpd

MOTION TO STRIKE THE "SECOND AFFIDAVIT OF  
MICK SCHANILEC" (FILED BY THE PLAINTIFF  
ON JUNE 15, 2016) - PAGE 2



JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

Attorney for Defendant/Counterclaim  
Plaintiff Philip Hudson

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DISTRICT

JUN 17 A 10:25

CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

NO. CV-15-1075

**MEMORANDUM IN SUPPORT OF  
MOTION TO STRIKE THE  
"SECOND AFFIDAVIT OF MICK  
SCHANILEC" (FILED BY THE  
PLAINTIFF ON JUNE 15, 2016)**

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Counterclaim Defendants.

COMES NOW Defendant/Counterclaim Plaintiff Philip Hudson, by and through his attorney of record, John F. Magnuson, and respectfully submits this Memorandum in support of Defendant Hudson's "Motion to Strike the Second Affidavit of Mick Schanilec (filed on June 15, 2016)." This Memorandum is supported by the pleadings and submissions on file herein.

### **I. PROCEDURAL BACKGROUND.**

On April 18, 2016, Plaintiff filed its "Motion for Partial Summary Judgment Re: State of Idaho's First Claim for Relief." Said Motion was filed pursuant to IRCP 56. The Motion was accompanied by the Affidavits of Mick Schanilec and Matthew Anders. Hearing in this matter has been set for June 22, 2016.

Pursuant to Rule 56(c), Defendant filed its opposing materials, including the Declarations of Ernest M. Warner, PLS; Drew Dittman, P.E., and John F. Magnuson. On June 15, 2016, Plaintiff filed a "Second Affidavit of Mick Schanilec." That Affidavit is the subject of this Motion to Strike.

### **II. APPLICABLE STANDARDS.**

Under IRCP 56(c), a motion for summary judgment and supporting affidavits "shall be served at least twenty-eight (28) days before the time fixed for the hearing." Rule 56(c) also allows a moving party to "serve a reply brief not less than seven (7) days before the date of the hearing." IRCP 56(c) does not contemplate, nor does it allow, "reply affidavits" or any other affidavit not filed and served twenty-eight (28) days before the time fixed for the hearing.

The language contained in IRCP 56(c), which requires that a movant support a motion for summary judgment with affidavits filed no less than twenty-eight (28) days before the hearing, and which further limits the movant to only a reply memorandum (as opposed to reply affidavits), is

mandatory. See, e.g., Sun Valley v. Rosholt, Robertson & Tucker, 133 Idaho 1, 5, 981 P.2d 236 (1999).

Federal Courts have reached the same conclusion under Federal procedures applicable to motions for summary judgment. In Tishcon Corp. v. Soundview Communications, Inc., 2005 WL 6038743 (N.D. Ga. 2005), the plaintiff moved for partial summary judgment and submitted supporting declarations. After the defendant had responded, the plaintiff submitted additional declarations with its reply memorandum. The defendant then moved to strike the plaintiff's reply declarations, arguing that they were untimely because any affidavit supporting a motion for summary judgment must be served with the motion itself. The defendant contended that because the reply declarations were submitted after the defendant had responded to the plaintiff's motion, that the defendant would be unfairly prejudiced by the Court's consideration of those declarations.

The Court agreed with the defendant, noting that the rule was intended "to insure that the party opposing a motion for summary judgment be given sufficient time to respond to the affidavits filed by the moving party, thereby avoiding any undue prejudice." Tishcon Corp., 2005 WL 6038743 at p. 8.

Justice is not served by allowing a moving party to unfairly surprise and prejudice the non-movant by producing evidence of new, substantive facts at the last minute when there is no opportunity [under the rules] for the non-movant to respond . . . .

Tishcon Corp., 2005 WL 6038743 at p. 8.<sup>1</sup>

---

<sup>1</sup>A copy of the Court's decision in Tishcon Corp. v. Soundview Communications, Inc., 2005 WL 6038743 (N.D. Ga. 2005) is attached hereto for the Court's convenience.



### III. CONCLUSION.

The terms and provisions of IRCP 56(c) are mandatory. The Second Affidavit of Mick Schanilec filed June 15, 2016, is untimely and should be stricken from the record and not considered on Plaintiff's pending motion for partial summary judgment.

DATED this 16<sup>th</sup> day of June, 2016.



\_\_\_\_\_  
JOHN F. MAGNUSON  
Attorney for Defendant/Counterclaim Plaintiff

### CERTIFICATE OF SERVICE

I hereby certify that on this 16<sup>th</sup> day of June, 2016, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Angela Schaer Kaufmann, Esq.  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
P.O. Box 83720  
Boise, ID 83720

  X   U.S. MAIL  
       E-MAIL TRANSMISSION  
       HAND DELIVERED  
       OVERNIGHT MAIL  
  X   FACSIMILE - 208\854-8072



HUDSON-STRIKE.BRF.wpd

2005 WL 6038743

Only the Westlaw citation is currently available.  
United States District Court,  
N.D. Georgia,  
Atlanta Division.

TISHCON CORP., Plaintiff,

v.

SOUNDVIEW COMMUNICATIONS, INC., Robert  
Jay Rowen, M.D., Nan Kathryn Fuchs, Ph.D.,  
Garret W. Wood, and Soundview Publications,  
Inc., d/b/a Healthy Resolve, Defendants.

Civil Action No. 1:04-CV-524-JEC.

Feb. 15, 2005.

Named Expert: Raj K. Chopra, Edward P. Norkus and  
Rajindar S. Sohal

#### Attorneys and Law Firms

Bruce L. Stein, Paul S. Aufrichtig, Peter D. Aufrichtig,  
Aufrichtig Stein & Aufrichtig, New York, NY, Laurie  
Anne Phelan, Mark Stephen Vanderbroek, Jeffrey C.  
Morgan, Troutman Sanders, Atlanta, GA, for Plaintiff.

Erinn Kelly Robinson, Scott Ernest Taylor, Stephen  
Melvin Dorvee, William H. Kitchens, Arnall Golden &  
Gregory, Peter A. Jaxsens, Jr., William Henry Major, III,  
Hawkins & Parnell, Atlanta, GA, for Defendants.

#### ORDER

JULIE E. CARNES, District Judge.

\*1 This case is presently before the Court on Plaintiff Tishcon Corporation's Motion for Partial Summary Judgment on Defendants' Liability [74]; Plaintiff Tishcon Corporation's Motion for Partial Summary Judgment on Defendants' Counterclaim. [77]; Defendants Soundview Publications, Inc. (d/b/a Healthy Resolve), Garret W. Wood, and Soundview Communications, Inc.'s Motion for Partial Summary Judgment [87]; Nan Kathryn Fuchs, Ph.D.'s and Dr. Robert Jay Rowen, M.D.'s Motion for Partial Summary Judgment [88]; Defendants Soundview Communications, Inc.'s and Soundview Publications, Inc.'s Motion to Strike Declaration of Peter D. Aufrichtig,

Esq. and to Exclude Hearsay Documents Submitted in Conjunction with Plaintiff's Motion for Partial Summary Judgment on Defendants' Counterclaim [94]; Defendants' Motion to Strike Declaration of Peter D. Aufrichtig and to Exclude Hearsay Documents [100]; AND Defendants' Motion to Strike the Declarations and Expert Testimony of Raj K. Chopra, Edward P. Norkus and Rajindar S. Sohal [124].

The Court has reviewed the record and the arguments of the parties and, for the reasons set out below, concludes that Plaintiff Tishcon Corporation's Motion for Partial Summary Judgment on Defendants' Liability [74] should be **DENIED**; Plaintiff Tishcon Corporation's Motion for Partial Summary Judgment on Defendants' Counterclaim [77] should be **DENIED**; Defendants Soundview Publications, Inc. (d/b/a Healthy Resolve), Garret W. Wood, and Soundview Communications, Inc.'s Motion for Partial Summary Judgment [87] should be **DENIED**; Nan Kathryn Fuchs, Ph.D.'s and Dr. Robert Jay Rowen, M.D.'s Motion for Partial Summary Judgment [88] should be **DENIED**; Defendants Soundview Communications, Inc.'s and Soundview Publications, Inc.'s Motion to Strike Declaration of Peter D. Aufrichtig, Esq. and to Exclude Hearsay Documents Submitted in Conjunction with Plaintiff's Motion for Partial Summary Judgment on Defendants' Counterclaim [94] should be **GRANTED in part and DENIED in part**; Defendants' Motion to Strike Declaration of Peter D. Aufrichtig and to Exclude Hearsay Documents [100] should be **GRANTED in part and DENIED in part**; AND Defendants' Motion to Strike the Declarations and Expert Testimony of Raj K. Chopra, Edward P. Norkus and Rajindar S. Sohal [124] should be **GRANTED**.

#### BACKGROUND

Plaintiff, Tishcon Corp. ("Tishcon"), manufactures a kind of supplement called Coenzyme Q<sub>10</sub> ("CQ"). (Pl.'s Mem. of Law in Supp. of its Mot. for Partial Summ. J. on Defs.' Liability ("Summ. J. Defs.' Liability") [74] at 2.) Plaintiff manufactures its formulation of CQ under the brand name Q-GEL® ("Q-GEL"). (*Id.*) Plaintiff brings this action against defendants Soundview Communications, Inc. ("Soundview Communications"), Robert Jay Rowen, M.D. ("Rowen"), Nan Kathryn Fuchs, Ph.D. ("Fuchs"), Garret W. Wood ("Wood"), and Soundview Publications, Inc. d/b/a Healthy Resolve ("Soundview Publications"). Like plaintiff, defendants are involved in the sale and marketing of CQ, albeit competing formulations. (Defs. Soundview Publications, Inc. (d/b/a Healthy Resolve),



Garret W. Wood, and Soundview Communications, Inc.'s Mot. for Partial Summ. J. ("Soundview Summ. J.") [87] at 2-4.) However, unlike plaintiff, none of the defendants actually manufacture CQ. (*Id.*)

\*2 Instead, defendant Soundview Publications purchases its CQ formulation from a third-party manufacturer not named as a defendant to this action and then resells that product directly to individual consumers through certain health newsletters. (*Id.*) Defendant Soundview Communications is the management company for Soundview Publications and also publishes the health newsletters which Soundview Publications uses as a vehicle to advertise its CQ supplement. Defendant Fuchs edits one of these health newsletters called *Women's Health Letter*. (*Id.* at 4.) Defendant Rowen edits another one of these health newsletters called *Second Opinion*. (*Id.*) Defendant Wood is a principal corporate officer of both Soundview Communications and Soundview Publications. (*Id.*)

Plaintiff contends that defendants have made false statements in inserts and newsletters distributed to third parties about the CQ formulation defendants distribute thereby, directly and by implication, making false statements about plaintiff's own Q-GEL. (Summ. J. Defs.' Liability at 2.) The bulk of the statements at issue concern the relative solubility of the competing CQ formulations; plaintiff refers to this issue as "bioavailability." (*Id.* at 3.) Plaintiff seeks to recover for false advertising in interstate commerce in violation of the Lanham Act, 15 U.S.C. § 1125(a) (2005), as well as for state common law violations. (*See id.* at 13.)

This case is presently before the Court on four separate motions for partial summary judgment. Plaintiff has filed two motions for partial summary judgment: one for partial summary judgment [74] as to defendants' liability on plaintiff's claims and one for partial summary judgment [77] as to defendants' counterclaims against the plaintiff. The Soundview defendants have filed a motion for partial summary judgment [87] as to plaintiff's claim for recovery of attorney's fees and profits as well as plaintiff's state common law claims and defendants Fuchs and Rowen have filed a separate motion for partial summary judgment [88] as to plaintiff's claims.

## DISCUSSION

Of great significance to the Court's consideration of the above summary judgment motions are the defendants' motions to strike. The first two motions to strike [94,100]

seek to strike two declarations of plaintiff's counsel, Peter D. Aufrichtig, and to exclude the allegedly hearsay documents that he attempts to introduce through these declarations. Aufrichtig's Declaration was filed in support of plaintiff's motion for partial summary judgment on defendants' liability and plaintiff's motion for partial summary judgment on defendants' counterclaim.

Plaintiff apparently perceived some merit in defendants' motion to strike its counsel's declaration, because after the latter motion was filed, plaintiff attached declarations of three new witnesses in its reply briefs on its two motions for summary judgment. This proffer of new evidence in a reply brief prompted the defendants to file their second motion to strike, which motion endeavored to strike the declarations of these newly-added witnesses.

\*3 The Court begins by addressing the pending motions to strike, as the outcome of these motions determines the evidence before the Court on the pending summary judgment motions.

### I. Motions to Strike Declarations of Peter D. Aufrichtig

Defendants Soundview Communications, Inc.'s and Soundview Publications, Inc.'s Motion to Strike Declaration of Peter D. Aufrichtig, Esq. and to Exclude Hearsay Documents Submitted in Conjunction with Plaintiff's Motion for Partial Summary Judgment on Defendants' Counterclaim [94] is a motion to strike the declaration of Mr. Aufrichtig that is attached to Plaintiff's Memorandum of Law in Support of its Motion for Partial Summary Judgment on Defendants' Counterclaim ("Summ. J. Defs.' Counterclaim") [77]. Defendants' Motion to Strike Declaration of Peter D. Aufrichtig and to Exclude Hearsay Documents [100] is a motion to strike a different declaration of Mr. Aufrichtig that is attached to Plaintiff's Memorandum of Law in Support of its Motion for Partial Summary Judgment on Defendants' Liability [74]. Though the two declarations are different, defendants' grounds for striking them are the same, so the Court will address the pending motions to strike Mr. Aufrichtig's declarations together.

Defendants argue that Mr. Aufrichtig's declarations should be struck for two reasons. First, defendants argue that Mr. Aufrichtig's unsworn declarations fail to comply with 28 U.S.C. § 1746. (Defs. Soundview Communications, Inc.'s and Soundview Publications, Inc.'s Mot. to Strike Decl. of Peter D. Aufrichtig, Esq. and to Exclude Hearsay Docs. Submitted in Conjunction with Pl.'s Mot. for Partial Summ. J. on Defs.' Counterclaim ("Soundview Strike") [94] at 2; Defs.' Mot.



to Strike Decl. of Peter D. Aufrichtig and to Exclude Hearsay Docs. (Defs.' Strike") [100] at 2 .) Second, defendants contend that Mr. Aufrichtig's declarations contain statements about matters not within his personal knowledge. (Soundview Strike at 2; Defs.' Strike at 5.)

#### A. Verification Pursuant to 28 U.S.C. § 1746

When ruling on summary judgment, the Court may consider pleadings, depositions, answers to interrogatories, admissions on file, and affidavits submitted by the parties. See [FED.R.CIV.P. 56\(c\)](#). An affidavit is, "[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public." Black's Law Dictionary 62 (8th ed.1990). Pursuant to [28 U.S.C. § 1746](#), for purposes of summary judgment, an unsworn declaration may be given the same force and effect as an affidavit if it is signed and dated and includes language in substantially the following form, "I declare (or certify, verify, or state) under penalty of perjury ... that the foregoing is true and correct. Executed on (date). (Signature)." [28 U.S.C. § 1746 \(2005\)](#).

Here, Mr. Aufrichtig's declarations have not been notarized and do not contain the language spelled out in [28 U.S.C. § 1746](#). Instead, both of Mr. Aufrichtig's declarations start with the statement, "Peter D. Aufrichtig, Esq., an attorney admitted to practice in this case, hereby declares under penalties of perjury the following ..." and end with Mr. Aufrichtig's electronic signature. Defendants argue that plaintiff's omission of the "true and correct" language constitutes a complete failure to comply with [28 U.S.C. § 1746](#), precluding the Court from giving Mr. Aufrichtig's declarations the same effect as an affidavit. (Def.'s Reply Br. in Supp. of Mots. to Strike Decls. of Peter D. Aufrichtig and to Exclude Hearsay Docs. ("Reply Strike") [127] at 3-4.) Plaintiff counters by insisting that a declaration made under penalty of perjury satisfies the requirements of [28 U.S.C. § 1746](#). (Pl.'s Mem. of Law in Opp'n to Defs.' Mots. to Strike the Declarations of Peter D. Aufrichtig and to Exclude Hearsay Docs. ("Opp'n Strike") [114] at 3.)

\*4 In fact, though neither party has cited nor has the Court located any authority from the Eleventh Circuit, other courts considering this issue have come out both ways. In [Smith v. Muscatell](#), 106 B.R. 307, 309 (Bankr.M.D.Fla.1989), the United States Bankruptcy Court for the Middle District of Florida, recognizing that [28 U.S.C. § 1746](#) does not mandate strict compliance with the exemplary clause provided in the statute, nevertheless rejected a declaration made "under the penalty of perjury" precisely because the declarant failed to declare his

statement to be "true and correct". *Id.* The *Smith* court concluded, "[a]lthough Trustee signed the unsworn declaration under the penalty of perjury, ... 'he never declared his statement to be true and correct, therefore his "affidavit" must be disregarded as summary judgment proof.' " *Id.* (internal citations and quotations omitted). More recently, the Second Circuit, faced with a factual scenario substantially similar to that presented in *Smith* and in this case, held differently, concluding that a unsworn letter signed with the statement, "under penalty of perjury, I make the statements contained herein," satisfied the requirements of [28 U.S.C. § 1746](#) and could be considered on summary judgment. [LeBoeuf, Lamb, Greene & MacRae, LLP v. Worsham](#), 185 F.3d 61, 65-66 (2d Cir.1999). Interestingly, both cases cite to the same case, [Nissho-Iwai American Corp. v. Kline](#), 845 F.2d 1300, 1306 (5th Cir.1988),<sup>1</sup> in support of their opposite outcomes.

Though all of this could have been avoided simply by plaintiff's use, verbatim, of the language set out in [28 U.S.C. § 1746](#), the Court is persuaded by the reasoning of the Second Circuit and concludes that Mr. Aufrichtig's use of the phrase, "hereby declares under penalties of perjury the following," is sufficient to satisfy [28 U.S.C. § 1746](#). By signing a statement under penalty of perjury, Mr. Aufrichtig has signaled that he understands the legal significance of his statements and the potential for punishment if he lies. See, e.g., [U.S. v. Bueno-Vargas](#), 383 F.3d 1104, 1111 (9th Cir.2004). In sum, absent any other objection, Mr. Aufrichtig has evinced his intention to submit sworn declarations, which the Court will accept as such and treat as affidavits for purposes of ruling on summary judgment. See [U.S. v. Four Parcels of Real Property](#), 941 F.2d 1428, 1444 n. 36 (11th Cir.1991)(indicating that on summary judgment, a court may consider a declaration executed in accordance with [28 U.S.C. § 1746](#) as an affidavit).

#### B. Affidavits Made on Personal Knowledge

Apart from the [28 U.S.C. § 1746](#) issue, however, defendants have also objected to the Court's use of Mr. Aufrichtig's declarations on the grounds that Mr. Aufrichtig swears to matters outside the scope of his personal knowledge and competency. (Soundview Strike at 2.) In response, plaintiff maintains that Mr. Aufrichtig has personal knowledge of the studies and articles which he seeks to authenticate.<sup>2</sup>

\*5 Federal Rule of Civil Procedure 56(e) governing the form of affidavits provides:

Supporting and opposing affidavits



shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits

...

FED.R.CIV.P. 56(e) (emphasis added). Consequently, on summary judgment, the Court does not accept testimony that is not based on personal knowledge. See *Citizens Concerned About Our Children v. School Bd. of Broward Cty., Fla.*, 193 F.3d 1285, 1295 n. 11 (11th Cir.1999). Declarations or affidavits not based on personal knowledge are subject to a timely motion to strike such as the ones made here by defendants. See *Richardson v. Oldham*, 12 F.3d 1373, 1378 (5th Cir.1994).

According to plaintiff's response, Mr. Aufrichtig, by virtue of his representation of plaintiff in a number of other false advertising lawsuits related to the products at issue in this case, has significant personal knowledge of the studies and articles he seeks to authenticate. (Opp'n Strike at 4.) Indeed, Mr. Aufrichtig is an attorney of record for plaintiff in this case. Given Mr. Aufrichtig's status as the attorney for a party in this case, the Court thus begins its inquiry into whether Mr. Aufrichtig has the requisite personal knowledge needed to introduce the studies and articles attached to his declaration cognizant of the long-standing principle in this circuit that,

we doubt that the disposition of [ ] cases is furthered by counsel being the personal vehicle by which the 'undisputed' facts are put before the Court. We consider it a tribute to the high calling of advocacy to say that we think it an unnatural, if not virtually impossible, task for counsel, in his own case, to drop his garments of advocacy and take on the somber garb of an objective fact-stater ... we doubt that it is conducive to the orderly administration of justice for counsel to become the voice on

summary judgment ... Experience proves that the adversary system functions best when the role of Judge, of counsel, of witness is sharply separated.

*Inglett & Co., Inc. v. Everglades Fertilizer Co., Inc.*, 255 F.2d 342, 349-50 (5th Cir.1958).<sup>1</sup> As noted by the Seventh Circuit, while "[t]he use of affidavits by counsel is in certain carefully confined situations undoubtedly appropriate ... it is a tactic fraught with peril ..." *Friedel v. City of Madison*, 832 F.2d 965, 970 (7th Cir.1987).

**1. Declaration of Mr. Aufrichtig Attached to Plaintiff's Memorandum of Law in Support of its Motion for Partial Summary Judgment on Defendants' Counterclaim [77]**

Turning first to the declaration of Mr. Aufrichtig that is attached to Plaintiff's Memorandum of Law in Support of its Motion for Partial Summary Judgment on Defendants' Counterclaim [77], the Court concludes that, with the exception of paragraphs 1, 7, and 33, Mr. Aufrichtig lacks personal knowledge of the evidence that plaintiff seeks to submit through paragraphs 2-6 and 8-32 of Mr. Aufrichtig's declaration. To have personal knowledge means more than to have been told that something is what it purports to be or to have collected the information from one's client. Personal knowledge is to know as a matter of first-hand knowledge, a document's source or authenticity.

\*6 In limited circumstances, such knowledge may be inferred from a document's content. For example, paragraph 1 of Mr. Aufrichtig's declaration states "Exhibit 1 is a copy of the Amended Complaint in this action." As he is plaintiff's counsel, the Court infers Mr. Aufrichtig's personal knowledge of the Complaint in this case.<sup>1</sup> Such an inference however, cannot be made for the patent nor the myriad of academic articles, studies, Tishcon advertisements, and copies of the Tishcon website that plaintiff attempts to introduce via the rest of Mr. Aufrichtig's declaration. While several of the articles attached to Mr. Aufrichtig's declaration appear to be what Mr. Aufrichtig claims them to be, other studies, articles, and advertisements attached to Mr. Aufrichtig's declaration look like something that was printed off of a home computer.

The inherent difficulty associated with identifying photocopies of articles, studies, and advertisements is precisely why, "[t]o be considered by the court, 'documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and



the affiant must be a person through whom the exhibits could be admitted into evidence.’ ” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550-51 (9th Cir.1990). It is not the job of the Court to guess or make assumptions about what these documents really are, nor should a Court do so. If plaintiff wanted the Court to consider on summary judgment the patent, articles, studies, advertisements, and portions of the website it attached to Mr. Aufrichtig’s declaration, it was plaintiff’s responsibility to produce an affiant with personal knowledge of these materials. Mr. Aufrichtig is not that affiant. Consistent with the above, the Court strikes paragraphs 2-6 and .8-32 of Mr. Aufrichtig’s declaration, and the materials attached thereto. As to these paragraphs, the Court **GRANTS** Defendants Soundview Communications, Inc.’s and Soundview Publications, Inc.’s Motion to Strike Declaration of Peter D. Aufrichtig, Esq. and to Exclude Hearsay Documents Submitted in Conjunction with Plaintiff’s Motion for Partial Summary Judgment on Defendants’ Counterclaim [94]. As to paragraphs 1, 7, and 33, the Court **DENIES** Defendants Soundview Communications, Inc.’s and Soundview Publications, Inc.’s Motion to Strike Declaration of Peter D. Aufrichtig, Esq. and to Exclude Hearsay Documents Submitted in Conjunction with Plaintiff’s Motion for Partial Summary Judgment on Defendants’ Counterclaim [94].

## 2. Declaration of Mr. Aufrichtig Attached to Plaintiff’s Memorandum of Law in Support of its Motion for Partial Summary Judgment on Defendants’ Liability [74]

Defendants have also challenged the declaration of Mr. Aufrichtig that is attached to Plaintiff’s Memorandum of Law in Support of its Motion for Partial Summary Judgment on Defendants’ Liability [74]. This declaration is similar in content to the declaration attached to Plaintiff’s Memorandum of Law in Support of its Motion for Partial Summary Judgment on Defendants’ Counterclaim [77], but lengthier and with additional attachments. As to this declaration, the Court likewise concludes that Mr. Aufrichtig lacks personal knowledge of the evidence which plaintiff seeks to submit through paragraphs 2-24, 32, 34-35, 39, 45-46, 48, and 50. Each of these paragraphs is a statement about an article, scientific abstract, study, book excerpt, advertisement, or test result that is attached to Mr. Aufrichtig’s declaration. As to each of these scientific items, there is no evidence, nor is it reasonable to infer that Mr. Aufrichtig has the requisite personal knowledge. Similarly, it cannot be reasonably inferred by the fact that he is plaintiff’s lawyer that Mr. Aufrichtig has personal knowledge of plaintiff’s advertisements. Consistent with the above, the Court

strikes paragraphs 2-24, 32, 34-35, 39, 45-46, 48, 50, and the material attached thereto. As to these paragraphs, the Court **GRANTS** Defendants’ Motion to Strike Declaration of Peter D. Aufrichtig and to Exclude Hearsay Documents [100].

\*7 In contrast, the Court accepts, as based upon Mr. Aufrichtig’s personal knowledge, paragraphs 1, 25-31, 33, 36-38, 40-44, 47, 49, 51-53, and the material attached thereto of Mr. Aufrichtig’s declaration. These paragraphs reference pleadings in this case and excerpts from deposition transcripts in this case for which it is reasonable to infer Mr. Aufrichtig’s personal knowledge. Accordingly, as to these paragraphs the Court **DENIES** Defendants’ Motion to Strike Declaration of Peter D. Aufrichtig and to Exclude Hearsay Documents [100].

## II. Motion to Strike Declarations of Raj K. Chopra, Edward P. Norkus, and Rajindar S. Sohal

In response to defendants’ motions to strike the declarations of Mr. Aufrichtig and to exclude hearsay documents referenced therein, see discussion *supra*, plaintiff submitted the declarations of Raj. K. Chopra (“Chopra”), Edward P. Norkus (“Norkus”), and Rajindar S. Sohal (“Sohal”) as an alternative means of introducing many of the same materials attached to Mr. Aufrichtig’s two declarations. Defendants object to the introduction of these declarations and the materials attached thereto as untimely, under Rule 6(d) of the Federal Rules of Civil Procedure, and as inadmissible, undisclosed expert testimony in violation of Rule 701 of the Federal Rules of Evidence and Rule 26 of the Federal Rules of Civil Procedure. (Defs. Br. in Supp. of Mot. to Strike the Decls. and Expert Testimony of Raj K. Chopra, Edward P. Norkus and Rajindar S. Sohal (“Strike CNS”) [124] at 2-3.). Defendants ask the Court to strike the declarations and, ultimately, the expert testimony of all three of these individuals. (*Id.*) Finally, defendants object to the “updated” statement of material facts filed by plaintiff which purports not to change the substance of plaintiff’s initial statement of undisputed facts, but, instead, merely to add citations to the previously undisclosed Chopra, Norkus, and Sohal declarations. (*Id.* at 3.)

In response, plaintiff avers that the challenged declarations are not untimely, and, instead, were properly filed in reply to defendants’ response to plaintiff’s two motions for partial summary judgment. (Pl.’s Br. in Opp’n to Defs.’ Mot. to Strike the Decls. of Raj K. Chopra, Edward P. Norkus and Rajindar S. Sohal (“Opp’n Strike CNS”) [130] at 1.) Plaintiff further avers that the Chopra declaration was timely filed in response to defendants’ summary judgment motion. (*Id.*) Finally, with



regard to the expert witness challenge, plaintiff contends that Chopra, Norkus, and Sohal may properly testify as lay witnesses under [Rule 701 of the Federal Rules of Evidence](#). (*Id.*)

**A. Should the Chopra, Norkus, and Sohal Declarations be Excluded as Untimely Filed?**

Under the Federal Rules of Civil Procedure, “[w]hen a motion is supported by affidavit, the affidavit shall be served with the motion ...” [FED.R.CIV.P. 6\(d\)](#). Analogous provisions of this Court’s local rules provide similarly that, “[e]very motion presented to the clerk for filing shall be accompanied by a memorandum of law which cites supporting authority. If allegations of fact are relied upon, supporting affidavits must be attached to the memorandum of law.” L.R. 7.1A(1), N.D.Ga.

\*8 Based on these provisions, plaintiff argues that because the declarations of Chopra, Norkus, and Sohal which support plaintiff’s two motions for partial summary judgment were filed as part of plaintiff’s reply after defendants had already responded to plaintiff’s two motions for partial summary judgment, the declarations of Chopra, Norkus, and Sohal are untimely and should not be considered by the Court in ruling on summary judgment.<sup>8</sup> (Strike CNS at 4.) Defendants argue that, were the Court to allow these declarations, defendants would be unfairly prejudiced by a lack of opportunity to respond to plaintiff’s delayed filings. (*Id.* at 5.)

Plaintiff contends that it properly filed the declarations of Chopra, Norkus, and Sohal in support of its reply briefs, as well as to address issues raised by defendants in their response briefs. (Opp’n Strike CNS at 2.) Plaintiff cites the unpublished decisions of *Kershner v. Norton*, No. 02-1887, 2003 U.S. Dist. LEXIS 14117, \*4-5 (D.D.C. Aug. 14, 2003) and *Shah v. Clark Atlanta Univ., Inc.*, No. 1: 97-CV-3786, 1999 U.S. Dist. LEXIS 22077, \*30-33 (N.D.Ga. July 19, 1999), in support of its position that federal courts have consistently considered affidavits filed with reply briefs. (Opp’n Strike CNS at 3.)

While plaintiff is correct in asserting that both the *Kershner* and *Shah* courts considered affidavits attached to reply briefs, plaintiff misses an important distinction raised by both courts. Namely, the affidavits attached to the reply briefs at issue in *Kershner* and *Shah* were considered only because the affidavits were submitted, specifically, for the limited purpose of responding to matters raised in the responses filed by the opposing parties. That consideration of affidavits filed with reply briefs is quite different from the issue presented in this case. Unlike in the *Kershner* and *Shah* cases, where the

affidavits submitted with the replies were used merely to counter a point made in the opposition’s response, here the declarations submitted by plaintiff with its replies are not limited to addressing an argument initiated by defendants in their responses. Instead, they are offered and intended to replace inadequate evidentiary submissions offered in support of plaintiff’s two motions for partial summary judgment. Stated differently, plaintiff offers the declarations attached to its replies as a substitution for declarations of Mr. Aufrechtig that defendants have in large part successfully challenged. See discussion *supra*.

As defendants correctly note, [Rule 6\(d\) of the Federal Rules of Civil Procedure](#) requires that affidavits in support of a motion for summary judgment be submitted with the motion in order to be considered. This rule is designed, indeed its purpose, is to insure that the party opposing a motion for summary judgment be given sufficient time to respond to the affidavits filed by the moving party, thereby avoiding any undue prejudice. Justice is not served by allowing a moving party to unfairly surprise and prejudice the non-movant by producing evidence of new, substantive facts at the last minute when there is no opportunity for the non-movant to respond. This is precisely the kind of trial by ambush that the federal rules summarily reject.

\*9 Here, as a practical matter, unless the Court permitted the defendants to reply to plaintiff’s reply, defendants would have no opportunity to respond to the evidence that plaintiff contends to be pivotal in deciding the motions at issue. In short, the procedure utilized by plaintiff, if allowed in every case, would greatly extend the time required to deal with a motion by the opposing party, and review thereof. This the Court cannot allow. Accordingly, on timeliness grounds, the Court **GRANTS** Defendants’ Motion to Strike the Declarations and Expert Testimony of Raj K. Chopra, Edward P. Norkus and Rajindar S. Sohal [124].

**B. Should Chopra, Norkus, or Sohal’s declarations and, ultimately, their testimony be excluded as undisclosed expert witness testimony?**

The Court does not have to reach, and does not dispositively reach, the question whether the testimony of the above witnesses would be excluded, had their declarations not been untimely tendered. Nevertheless, because the propriety of these witnesses’ testimony could have a bearing on the future litigation of this case, the Court notes that it has substantial doubts that the proffered testimony from the above witnesses would have been allowed, even had their declarations been attached to



the original motions for summary judgment filed by plaintiff.

Specifically, defendants muster a persuasive argument that the declarations of Chopra, Norkus, and Sohal should be struck because the declarations constitute undisclosed expert testimony improperly introduced as opinion testimony by a lay witness in contravention of [Federal Rules of Evidence 701 and 702](#). (Strike CNS at 6.) Defendants contend that the declaration testimony of Chopra, Norkus, and Sohal, and the documents referenced therein, constitute testimony “based on scientific, technical, or other specialized knowledge within the scope of [Rule 702](#).” [FED.R.EVID. 701](#). Defendants appear to have a pretty strong point with this argument.

[Rule 702](#) provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

When a party intends to use an expert, the Federal Rules of Civil Procedure require disclosure of that expert. [FED.R.CIV.P. 26\(a\)\(2\)](#) (“a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under [Rules 702, 703, or 705 of the Federal Rules of Evidence](#).”). In addition to disclosure, the federal rules also require that the party using an expert provide, “... a written report prepared and signed by the witness.” Among other things, this report must contain a complete statement of all opinions to be expressed by the expert, the data and other information considered in forming the expert’s opinions, any exhibits that will be used to summarize or support the expert’s opinions, the expert’s qualifications, the amount of compensation that the expert will be paid, and a listing of other cases in which the witness has testified in the last four years. See [FED.R.CIV.P. 26\(a\)\(2\)\(B\)](#). Further, in light of this federal mandate, the local rules of this Court clearly state:

\*10 Any party who desires to use the testimony of an expert witness shall designate the expert sufficiently early in the discovery period to permit the opposing party the opportunity to depose the expert and, if desired, to name its own expert witness sufficiently in advance of the close of discovery so that a similar discovery deposition of the second expert might also be conducted prior to the close of discovery.

Any party who does not comply with the provisions of the foregoing paragraph *shall not be permitted to offer the testimony of the party’s expert*, unless expressly authorized by court order based upon a showing that the failure to comply was justified ...

L.R. 26.2C, NDGa (emphasis added). Given the rules requiring timely disclosure of expert witnesses and the fact that plaintiff indicated during discovery that plaintiff would not be utilizing any expert testimony, defendants argue that the declarations of these individuals must be struck. (Strike CNS at 16.)

Plaintiff counters that disclosure of Chopra, Norkus, and Sohal was not required because they are lay, not expert, witnesses. (Opp’n Strike at 10, 14.) Plaintiff contends that the declarations of Norkus and Sohal are not based on the kind of expertise or education that would render them expert witnesses, but, instead, constitute mere factual testimony about the results of studies conducted by each. (*Id.* at 12.) Moreover, to the extent Chopra’s declaration contains some expert opinions, plaintiff argues that as an officer and owner of plaintiff corporation Tishcon, Chopra may testify as a “hybrid” expert witness—a kind of lay witness who nevertheless may express some expert opinions. (*Id.* at 16.) In addition, as to Chopra, plaintiff contends that plaintiff’s initial disclosures listing Chopra as, among other things, an individual likely to have discoverable information on a variety of topics,<sup>6</sup> provided defendants with ample notice of Chopra’s technical and scientific knowledge about issues in this case. (*Id.* at 16.)

In this circuit, if a party fails to disclose and identify an expert witness during discovery, the district court may exclude that expert’s affidavit and prohibit that witness from testifying at trial. See [Hancock v. Hobbs](#), 967 F.2d 462, 468 (11th Cir.1992). Consequently, if Norkus, Sohal, or Chopra’s testimony is deemed to be expert testimony, it is subject to exclusion because the plaintiff never designated them as experts and defendants were therefore not on notice during discovery that their opinions should be probed on cross-examination or be contradicted with expert testimony proffered by the defendants.

[Federal Rule of Evidence 701](#) was amended in 2000 specifically to address the issue presented here, namely,



"to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." FED.R.EVID. 701, Advisory Comm. Notes, 2000 Amendments. The Advisory Committee Notes to Rule 701 go on to explain: "lay testimony 'results from a process of reasoning familiar in everyday life' while expert testimony 'results from a process of reasoning which can be mastered only by specialists in the field.' " Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

\*11 As noted, lay testimony "results from a process of reasoning familiar in everyday life," whereas expert testimony "results from a process of reasoning which can only be mastered by specialists in the field." A review of the studies and articles attached to these three declarations makes it very difficult to argue that the declarants' testimony about these materials employs a reasoning that is familiar in everyday life. Clearly, on these very technical topics, the three declarants are utilizing reasoning that only a specialist in the field could master. Thus, to the extent that these declarants would offer testimony about the validity of the tests or studies, such testimony would clearly seem to be expert in nature.

There is a possible theory under which these declarants' testimony might not constitute expert testimony. Specifically, plaintiff argues that some of defendants' false statements were contained in assertions that certain studies or tests existed, or did not exist, with regard to a particular aspect of the performance of plaintiff's or defendants' product. Accordingly, if a witness's testimony were nothing more than a confirmation of the fact that a given test or study existed-not whether the study or test results were valid-arguably the witness's testimony would not be that of an expert. Yet, this argument succeeds only if a lay finder of fact could review the test or study and readily understand its meaning. If there is a dispute about what a particular test or study means or says, such that one needs an expert "interpreter" to translate the study to the lay finder, then plaintiff finds itself once again in need of an expert witness. From a review of the documents that plaintiff has attached to its declarants' testimony, it seems to this Court that translation by an expert of the specialized, scientific language in these reports is necessary.

Thus, while the Court does not decide dispositively, it appears that the testimony of Norkus and Sohal would not be admissible in a motion for summary judgment or at

trial. With regard to Chopra, plaintiff argues that his testimony is exempt from the expert disclosure requirement because he is Chairman of the Board and CEO of Tishcon Corp. Specifically, plaintiff bases its argument in this regard on the Eleventh Circuit's reading of the Advisory Committee Notes to Rule 701 of the Federal Rules of Evidence. To wit, this circuit recognizes that, even after the 2000 amendments to Rule 701, owners and officers of businesses may testify without the necessity of qualifying as an expert. See *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., Ltd.*, 320 F.3d 1213 (11th Cir.2003). Indeed, the Eleventh Circuit has read the Advisory Committee Notes to Rule 701 to mean "that opinion testimony by business owners and officers is one of the prototypical areas intended to remain undisturbed." *Id.* at 1222.

Yet, this exception for an owner or officer of a business, by its terms, appears limited, and logically so, to business matters within the company, such as losses, profits, income, expenses, and the like. This is why the Advisory Committee Notes on the amendments made to Rule 701 in 2000 provide, "most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert." FED.R.EVID. 701, Advisory Comm. Notes, 2000 Amendments (emphasis added). There is no allowance in the Advisory Committee Notes for an owner or officer of a business to testify about scientific matters without separately being disclosed as an expert. The Court can discern no good reason why the owner of a business, by virtue of his status, should automatically be conferred with authority to opine on the validity of scientific studies. While an owner may have the expertise to offer such information, this undertaking would presumably transform the owner into an expert in most situations.<sup>8</sup>

\*12 The Court is aware that the plaintiff did make some special disclosure that Chopra was an "individual likely to have discoverable information" about certain matters that might be at issue in the case.<sup>9</sup> Thus, although Chopra was not formally designated as an expert, it may be that defendants were effectively on notice of the matters about which he might opine. Were that true, the Court would then have to decide whether it was appropriate to bend the long-standing rule in this district requiring explicit disclosure of an expert, along with an expert report. At this juncture, however, the facts and contentions are too garbled for the Court to determine how such an argument might play out. In short, the Court has significant doubts that the three declarants at issue would be allowed to offer expert opinions at any trial.



### III. Parties Motions for Partial Summary Judgment

Having decided the above, the Court is left to consider the four pending motions for partial summary judgment: Plaintiff Tishcon Corporation's Motion for Partial Summary Judgment on Defendants' Liability [74]; Plaintiff Tishcon Corporation's Motion for Partial Summary Judgment on Defendants' Counterclaim [77]; Defendants Soundview Publications, Inc. (d/b/a Healthy Resolve), Garret W. Wood, and Soundview Communications, Inc.'s Motion for Partial Summary Judgment [87]; and, lastly, Nan Kathryn Fuchs, Ph.D.'s and Dr. Robert Jay Rowen, M.D.'s Motion for Partial Summary Judgment [88].

With regard to plaintiff's motion for partial summary judgment on defendants' liability and plaintiff's motion for partial summary judgment on defendants' counterclaim; as the Court has struck the declarations offered by plaintiff in support of its motions for partial summary judgment and as it appears that those motions cannot succeed, at this point, without the declarations and proffered evidence the Court **DENIES** Plaintiff Tishcon Corporation's Motion for Partial Summary Judgment on Defendants' Liability [74] and **DENIES** Plaintiff Tishcon Corporation's Motion for Partial Summary Judgment on Defendants' Counterclaim [77].

With regard to defendants' motions for partial summary judgment, to some extent, a review of these motions is likewise difficult on the present pleadings, given that the Court has struck the declarations offered by plaintiff. Moreover, given the state of the record at this time, it does not seem prudent to make firm determinations on any of the parties' summary judgment motions at this time. As there will be a trial in this case, absent a settlement, these matters can be revisited at that time. Accordingly, the Court **DENIES** Defendants Soundview Publications, Inc. (d/b/a Healthy Resolve), Garret W. Wood, and Soundview Communications, Inc.'s Motion for Partial Summary Judgment [87] and **DENIES** Nan Kathryn Fuchs, Ph.D.'s and Dr. Robert Jay Rowen, M.D.'s Motion for Partial Summary Judgment [88].

### IV. Future Proceedings

Given the complexity of the record, a trial of this case will be facilitated by a more detailed pretrial Order than would usually be filed. In such an Order, for example, the Court would want the plaintiff to list each false statement by defendants that it is asserting and to set out, for each statement, the evidence that it would be offering in

support of its contention that the statement by defendant was false. For each such statement, defendants would list the contrary evidence that they are offering and/or succinct legal arguments as to why the statement is not actionable. Plaintiff would, in this same list, indicate any contrary legal arguments.

**\*13** Instead of directing the filing of such an Order now, however, the Court believes that the parties would benefit from a mediation period. Both parties appear to have certain vulnerabilities in this litigation and a settlement would appear to be prudent. The Court will **STAY** this litigation for **ninety (90) days** to allow the parties to mediate the action. The parties shall file a status report indicating the date of mediation and any other pertinent information by **March 16, 2006**. This action shall be **ADMINISTRATIVELY TERMINATED** to permit the parties to mediate the action. The Clerk shall reopen the action on **May 15, 2006**, unless the parties have indicated to the Court that the action has settled or unless the Court otherwise extends this mediation period.

### CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiff Tishcon Corporation's Motion for Partial Summary Judgment on Defendants' Liability [74]; **DENIES** Plaintiff Tishcon Corporation's Motion for Partial Summary Judgment on Defendants' Counterclaim [77]; **DENIES** Defendants Soundview Publications, Inc. (d/b/a Healthy Resolve), Garret W. Wood, and Soundview Communications, Inc.'s Motion for Partial Summary Judgment [87]; **DENIES** Nan Kathryn Fuchs, Ph.D.'s and Dr. Robert Jay Rowen, M.D.'s Motion for Partial Summary Judgment [88]; **GRANTS in part and DENIES in part** Defendants Soundview Communications, Inc.'s and Soundview Publications, Inc.'s Motion to Strike Declaration of Peter D. Aufrechtig, Esq. and to Exclude Hearsay Documents Submitted in Conjunction with Plaintiff's Motion for Partial Summary Judgment on Defendants' Counterclaim [94]; **GRANTS in part and DENIES in part** Defendants' Motion to Strike Declaration of Peter D. Aufrechtig and to Exclude Hearsay Documents [100]; **AND GRANTS** Defendants' Motion to Strike the Declarations and Expert Testimony of Raj K. Chopra, Edward P. Norkus and Rajindar S. Sohal [124].

SO ORDERED.



## All Citations

Not Reported in F.Supp.2d, 2005 WL 6038743

## Footnotes

- <sup>1</sup> The *Nissho-Iwai* case does not really aid the Court in its decision today. In *Nissho-Iwai*, the court rejected as competent summary judgment evidence an "affidavit" that was "neither sworn *nor* its contents stated to be true and correct *nor* stated under penalty of perjury." 845 F.2d at 1305-06 (emphasis added). Here, the declarations at issue have been made under penalty of perjury, and are only missing the "true and correct" statement.
- <sup>2</sup> Plaintiff also argues that it has rectified any potential evidentiary defects in its use of Mr. Aufrichtig's declarations by filing three new declarations, one each from Mr. Raj Chopra, Dr. Edward Norkus, and Dr. Rajindar Sohal. (Opp'n Strike at 3-4.) As noted, the submission of these three new declarations triggered defendants' filing of Defendants' Motion to Strike the Declarations and Expert Testimony of Raj K. Chopra, Edward P. Norkus and Rajindar S. Sohal [124], which the Court will separately address later in this Order.
- <sup>3</sup> Decisions of the former Fifth Circuit rendered prior to October 1, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).
- <sup>4</sup> The Court also infers from the contents of the documents Mr. Aufrichtig's personal knowledge of the material referenced in paragraphs 7 (answer and counterclaim) and 33 (copies of deposition pages) of Mr. Aufrichtig's declaration.
- <sup>5</sup> The declarations of Norkus and Chopra were filed on June 15, 2005, just two days before plaintiff filed reply briefs on both of its pending motions for partial summary judgment. Sohal's affidavit was filed on June 17, 2005, the same day that plaintiff filed both of its reply briefs.
- <sup>6</sup> The topics were: Newsletters discussing Coenzyme Q<sub>10</sub>; Tishcon's Q-GEL product; the dissolution, absorption and bioavailability of Coenzyme Q<sub>10</sub> products in general and the literature regarding the same; animal studies relating to Coenzyme Q<sub>10</sub>; cell culture studies of Coenzyme Q<sub>10</sub> products; and the effect of particle size on absorption.
- <sup>7</sup> In its brief in opposition to defendants' motion to strike plaintiff omits the underlined portion of the advisory committee note. This omission does not strike the Court as consistent with plaintiff counsel's obligation of candor toward the tribunal. (See Opp'n Strike CNS at 15.)
- <sup>8</sup> Of course, to the extent that Chopra's state of mind or knowledge is an issue, either as to plaintiff's claims or defendants' counterclaims, Chopra's beliefs as to the validity of a particular study might be admissible, even though Chopra was not properly designated as an expert.
- <sup>9</sup> Specifically, in response to the question, "[p]rovide the name and, if known, the address and telephone number of each individual likely to have discoverable information that you may use to support your claims and defenses," plaintiff replied, "Raj K. Chopra, Chief Executive Officer of Tishcon Corp.," and then proceeded to spell out the scientific and technical matters that plaintiff contends Mr. Chopra has knowledge of." (Pl.'s Initial Disclosures [20] at 7, 10-12.)

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ISB #04270

Attorney for Defendant/Counterclaim  
Plaintiff Philip Hudson

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DISTRICT

16 JUN 17 A 10:25

CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

---

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Counterclaim Defendants.

NO. CV-15-1075

**MOTION TO SHORTEN TIME**



COMES NOW Defendant/Counterclaim Plaintiff Philip Hudson, by and through his attorney of record, John F. Magnuson, and respectfully moves the Court, pursuant to IRCP 1, 7, and 56(c), for entry of an Order shortening time as follows:

(1) On June 15, 2016, Plaintiff filed the "Second Affidavit of Mick Schanilec." That Affidavit relates to Plaintiff's pending Motion for Partial Summary Judgment, set to be heard by the Court on June 22, 2016 at 3:30 p.m.

(2) Given that the Affidavit was filed less than fourteen (14) days before the noticed hearing, there is insufficient time to provide fourteen (14) days of notice with respect to this Motion to Strike.

Based upon the reasons set forth above, Defendant respectfully requests that the Court enter an Order shortening time so as to allow the Court to hear Defendant's "Motion to Strike the Second Affidavit of Mick Schanilec (Filed by the Plaintiff on June 15, 2016)" on the Court's calendar of June 22, 2016 at 3:30 p.m.

ORAL ARGUMENT IS REQUESTED.

DATED this 16<sup>th</sup> day of June, 2016.

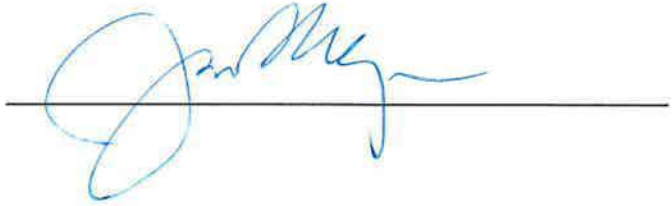
  
\_\_\_\_\_  
JOHN F. MAGNUSON  
Attorney for Defendant/Counterclaim Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 16<sup>th</sup> day of June, 2016, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Angela Schaer Kaufmann, Esq.  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
P.O. Box 83720  
Boise, ID 83720

  X   U.S. MAIL  
       E-MAIL TRANSMISSION  
       HAND DELIVERED  
       OVERNIGHT MAIL  
  X   FACSIMILE - 208\854-8072



HUDSON-SHORTEN TIME.MOT.wpd

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

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Chief, Natural Resources Division

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STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DISTRICT

2016 JUN 15 A 10:24

CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Counterclaim Defendants.

Case No. CV 2015-1075

REPLY MEMORANDUM IN  
SUPPORT OF STATE'S  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT RE:  
STATE OF IDAHO'S FIRST  
CLAIM FOR RELIEF



The State of Idaho, the State Board of Land Commissioners and the Idaho Department of Lands (collectively, “State”), by and through their attorneys of record the Idaho Office of the Attorney General, hereby submit this Reply Memorandum in Support of State’s Motion for Partial Summary Judgment re: State of Idaho’s First Claim for Relief. As further set forth in this Reply, there is no genuine issue of material fact that the State has authority under the Lake Protection Act, Title 58, Chapter 13 (“LPA”), to regulate encroachments on the beds of navigable lakes, which includes lands lying below the ordinary high water mark (“OHWM”) and between the OHWM and the artificial high water mark (“AHWM”). *See* I.C. §§ 58-1302(b) and 58-1303. Further, there is no genuine issue of material fact that no person may place encroachments on the beds of navigable lakes absent a permit from the State (I.C. § 58-1301), and that the subject fill lies on the bed of Priest Lake, a navigable lake. Therefore, the State’s Motion for Partial Summary Judgment should be granted in its entirety.

#### **SUMMARY OF THE STATE’S REPLY**

The State’s Motion is one for partial summary judgment, and pertains only to the First Claim for Relief set forth in the Verified Complaint. The First Claim seeks relief for “Violation of the Lake Protection Act and Demand for Removal of Unauthorized Fill.” By its Motion the State does *not* seek summary judgment as to the Second Claim for Relief, which is a trespass action in which title to the bed of the lake underneath the subject fill is at issue.

In his Memorandum in Opposition, Hudson makes much of the disagreement between the he and the State as to whether 2437.64 mean sea level (“msl”) is Priest Lake’s ordinary high water mark (“OHWM”) (the State’s position) or the artificial high water mark (“AHWM” or “summer pool”), which is his position. The State agrees that the State’s *ownership or title* (in

trust) to the beds of navigable waters is determined by reference to the OHWM at statehood<sup>1</sup>. However, title to the bed of Priest Lake beneath the Hudson Fill is not at issue in the State's Motion, rendering any disagreement about whether 2437.64 is the OWHM or AHWL irrelevant for purposes of the Motion.

There is no genuine issue of *material* fact that the State has the authority to regulate encroachments in, on or above the beds or waters of Priest Lake, a navigable lake, and that no person may place an encroachment in, on or above the beds of a navigable lake absent permission from the state in accordance with the LPA. I.C. § 58-1301 and -1303; Verified Complaint, ¶ 6; Answer and Counterclaim, ¶ 6. There is further no genuine issue of material fact that for purposes of the Lake Protection Act, Title 58, Chapter 13, Idaho Code ("LPA"), the beds of navigable lakes include not only lands lying beneath the natural or ordinary high water mark ("OHWM") but the lands lying between the OHWM and the artificial high water mark ("AHWM"). I.C. § 58-1302(b) and 58-1303. Finally, there is no genuine issue of material fact that the Hudson Fill lies waterward of 2437.64 msl, whether that level be the OWHM (as the State contends) or the AHWL or "summer pool" level (as Hudson contends).

The State's Motion should be granted.

### **UNDISPUTED FACTS**

Defendant Phillip Hudson ("Hudson") does not dispute the following critical facts:

1. Under Idaho Code § 70-507, the Idaho Department of Water Resources ("IDWR") supervises and controls the United States Geological Survey ("USGS") outlet gage on Priest Lake ("Outlet Gage").

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<sup>1</sup> See., e.g. *Erickson v. State*, 132 Idaho 208, 210, 970 P.2d 1, 3 (1998) (citing *Heckman Ranches, Inc. v. State*, 99 Idaho 793, 796, 589 P.2d 540, 543 (1979))

2. Also under Idaho Code § 70-507, IDWR is required to maintain Priest Lake's elevation at 3.0 on the Outlet Gage, which corresponds to 2437.64 feet above mean sea level ("msl"),<sup>2</sup> during the recreation season.
3. The Outlet Dam and lake elevation at Priest Lake have in fact been managed in accordance with I.C. § 70-507 since 1951. Affidavit of Matthew Anders, filed April 28, 2016 ("Anders Aff."), ¶ 19; Declaration of Ernest M. Warner, PLS, ¶ 12 ("Warner Dec.").
4. Priest Lake reached 3.0 gage datum, 2437.64 msl and higher, for periods of time each year prior to 1950. Anders Aff., Ex. E.
5. Hudson placed the fill at issue in this case in Priest Lake. Declaration of Philip Hudson, ("Hudson Dec.") ¶ 8.
6. The fill lies in whole or in part below elevation 2437.64. [CITE]

The parties disagree whether 2437.64 msl is the OHWM or AHWM of Priest Lake, and by filing and pursuing the Motion, the State does not concede that 2437.64 is the artificial rather than ordinary high water mark. That distinction is simply immaterial for purposes of this *Motion*.

### PERTINENT LEGAL STANDARDS

Idaho Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavit, if any, show that there is no genuine issue as to any **material fact** and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c) (emphasis added). Not every disputed fact is material. Instead "[a] material fact is one upon which the outcome of the case may be different." *Johnson v. North Idaho College*, 153 Idaho 58, 67, 278 P.3d 928, 937 (2012) (quoting *Peterson v. Romine*, 131 Idaho 537, 540, 960 P.2d 1266, 1269 (1998)) (bracketed material added). *See also Rife v. Long*, 127 Idaho 841, 908 P.2d 143 (1995) (holding that "[a] material issue of fact,

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<sup>2</sup> Section 70-507 provides that the gage datum at the Priest Lake outlet gage is 2434.64 msl. Gage datum "refers to the base, or 0.0 foot gage-height (stage) for a gage. <http://waterdata.usgs.gov/wa/nwis/current/?type=datum> (last visited June 10, 2016). Therefore, 3.0 on the gage is equivalent to 2437.64 msl (2434.64 gage datum + 3.0 feet).



for summary judgment purposes, is one that is relevant to an element of the claim or defense and whose existence might affect the outcome of the case.”) (bracketed material added).

As discussed below, whether 2437.64 is the OHWM or AHW is not material to the State’s Motion.

## **ARGUMENT**

### **A. The Lake Protection Act**

Idaho Code § 58-1301 provides in pertinent part that “[n]o encroachment on, in or above the beds or waters of any navigable lake in the state shall hereafter be made unless approval therefor has been given as provided in this act.” There is no dispute that Priest Lake is a navigable lake, which means that as a matter of law:

- No encroachment may be placed on, in or above the bed of Priest Lake unless approval has been obtained pursuant to the LPA and rules promulgated thereunder. I.C. § 58-1301 and -1303 through -1307;
- The State has statutory authority to regulate, control, and in appropriate circumstances permit encroachments “on in or above the beds or waters” of Priest Lake. I.C. § 58-1303.
- For purposes of the LPA, the bed of Priest Lake includes not only the lands below the OHWM of Priest Lake (and to which the State holds title in trust for the people of the state of Idaho), but also the lands lying between the OHWM and the AHW, should there be an AHW lying above the OHWM. I.C. § 58-1302(b).
- Mr. Hudson’s fill is a nonnavigational encroachment (*see* I.C. § 58-1302(i)).

### **B. There is No Genuine Issue of Fact That Priest Lake Has Been Maintained At An Elevation Of At Least 2437.64 MSL For More Than Sixty Years.**

As a matter of law, Idaho Code § 70-507 requires the Idaho Department of Water Resources (“IDWR”) to maintain Priest Lake at an elevation of 3.0 on the USGS Outlet Gage until the close of the main recreational season. Mr. Anders testified via his affidavit that Priest Lake’s elevation has been maintained at 3.0 feet at the Outlet Gage since at least 1951, and that 3.0 feet on the Outlet Gage is equivalent to 2437.64 feet msl (NGDV 1929). Hudson does not dispute that fact, with Mr. Warner stating that “the summer level of Priest Lake [] is maintained

at elevation 2437.64 by the subject dam.” Warner Dec., ¶26. Mr. Dittman’s number differed slightly, but the difference is not material to the State’s Motion: “[t]he summer pool elevation of Priest Lake is 2,437.8” (Exhibit A to Declaration of Drew Dittman (“Dittman Dec.”) and “the elevation of Priest Lake on the day of my visit was 2,435.8, approximately 2’ below summer pool level. . . .” (*Id.*). Mr. Dittman does not specify the source of the 2467.8 number.

**C. There is No Genuine Issue of Material Fact that Mr. Hudson was Required To Obtain an Encroachment Permit, and that He Failed to Do So Before Placing the Fill in Priest Lake**

In his Affidavit, Mick Schanilec testified that the Hudson fill is located waterward of 2437.64 msl, and thus subject to the requirements of Lake Protection Act. Schanilec Aff., ¶ 11. Mr. Hudson offered no sworn testimony to the contrary. In fact, his own witness Mr. Dittman stated that if the boundary line were extended “nineteen (19) feet waterward of the summer pool level maintained on Priest Lake, then most if not all of Mr. Hudson’s improvements would be located on his property as opposed to the property of the State of Idaho.” Dittman Dec., ¶ 6. Due to the subject fill’s location, Mr. Hudson was required by Idaho Code § 58-1301 to obtain an encroachment permit from the State before pursuing the subject fill.

There is no genuine issue of material fact that Mr. Hudson failed to obtain an encroachment permit before placing fill in the lake, and he in fact concedes that point. *See* Hudson Dec., ¶ 9. He attempts to excuse his failure to obtain a permit by stating that he thought that he owned the land upon which he placed the subject fill. *Id.*, ¶ 7. However, by his own admission, he began adding the fill in 1997. *Id.*, ¶ 4 and 8. That same year, he applied for and obtained Encroachment Permit L-97-S-983 (“Encroachment Permit”) for his dock. Schanilec Aff., Exhibit A. A portion of the dock lies directly adjacent to the subject fill. Second Affidavit of Mick Schanilec, ¶¶ 6 - 8 and Exs. E, F and G. Given the proximity in time, as well as the

proximity of the subject fill to his permitted dock, Mr. Hudson either knew or should have known that an encroachment permit was or might be required for the fill. This is particularly true given that the Joint Application for Permit (“Permit Application”) specifically inquires whether fill will be placed.<sup>3</sup> Schanilec Aff., Exhibit A, p. 4.

Mr. Hudson argument that he did not think he needed a permit because he thought he owned the land under the subject fill further rings hollow in light of the schematic drawing of Mr. Hudson’s dock, which was included with his Permit Application. The schematic drawing of Mr. Hudson’s dock, including measurements and the location of the dock relative to high and low watermarks. Schanilec Aff., Ex. A, p. 7. The dock segmented denoted as “Dock D” is closest to land, but the drawing shows “Dock D” is between the “HWM” and the “LWM”, and that it is “overwater.” *Id.* Page 8 of Exhibit A further shows that the Dock D segment would be built out over the water, and below the high water mark. *Id.*, p. 8. This is significant, because it shows that Mr. Hudson was well aware of where his dock would be and was built in relation to the high water mark (whether it be ordinary or artificial), and was further well aware of the legal requirements for encroachments in, on or above the beds of navigable lakes.

Perhaps most tellingly, Mr. Hudson admits that he placed the fill material “during periods when exposed and free from the presence of water” or when “the property upon which I worked was ‘dry’ and not covered by water . . .” Hudson Dec., ¶ 8. He further admits that this period of time is in the fall and winter. *Id.*, ¶ 6. In other words, Mr. Hudson concedes that he placed the fill during low water periods, because during high water periods (whether ordinary or artificial), the bed of Priest Lake lying underneath the subject fill would be underwater.

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<sup>3</sup> An encroachment permit application for navigable waters is a Joint Application because the U.S. Army Corps of Engineers, the State of Idaho, Department of Lands, and the State of Idaho, Department of Water Resources all have or may have jurisdiction over a particular encroachment activity. *See* Schanilec Aff., Ex. A, p. 4. Mr. Hudson was required, by the terms of his Encroachment Permit, to follow the details and specifications set forth in his application. *Id.*, p. 2.



In his Affidavit, Mr. Hudson admits that the fill (which he refers to as “stabilization work”) is located waterward of the encroachments authorized by the State. Hudson Dec., ¶16. The Second Affidavit of Mick Schanilec, filed concurrently herewith (“Second Schanilec Aff”), includes as exhibits photographs taken by Mr. Schanilec at the site of the Hudson encroachment and dock and illustrates the waterward nature of the fill. Exhibit E depicts the “Dock D” portion of Mr. Hudson’s dock, with the subject fill to the North. Second Schanilec Aff., ¶ 6, Ex. E. As one can clearly see, the subject fill extends alongside virtually the full length of “Dock D”, which Mr. Hudson designated in his encroachment application as below the high water mark and “overwater.” Schanilec Aff., Ex. A, p. 7. Again, that fact would explain why Mr. Hudson performed the fill work only in the fall and winter months, when the water was low.

Mr. Hudson also asserts that he constructed the subject fill in order to protect his property from “damage and degradation”. Hudson Dec., ¶ 5. That assertion too is suspect – other seawalls have been constructed on Mr. Hudson’s property that do not extend nearly as far waterward as the subject fill. Second Schanilec Aff., Exhibits E through J. Moreover, there are no other seawalls or fills in the vicinity of Mr. Hudson’s property that extend as far waterward as Mr. Hudson’s. Second Schanilec Aff., ¶ 12.

Finally, Mr. Hudson alleges that he used “naturally-occurring materials from land contiguous to the beach” to create the fill. Hudson Dec., ¶ 8. For purposes of the Lake Protection Act, it is completely irrelevant whether the fill materials are naturally-occurring or not – fill is fill, and it cannot be placed below the high water mark without a permit from the state. In addition, the assertion that the fill material is all naturally-occurring, and from Mr. Hudson’s property, is belied by the clear presence of concrete and “stepping stone” type rock slabs at the site of the fill, as shown in Exhibits E, H and I to the Second Schanilec Affidavit.

**D. The Subject Fill Is A Nonnavigational Encroachment and Must be Removed.**

Under the LPA, and navigational encroachments (or “encroachments in aid of navigation”) are “docks, piers, floats, pilings, breakwaters, boat ramps, channels or basins and other such aids to the navigability of the lake. . . .” I.C. § 58-1302(h). Nonnavigational encroachments (or “encroachments not in aid of navigation”) are “all other encroachments on, in or above the beds or waters of a navigable lake, including landfills or other structures not constructed primarily for use in aid of the navigability of the lake.” I.C. § 58-1302(i). The subject fill is a nonnavigational encroachment.

The subject fill is a wrongful encroachment, because it was placed without first complying with Idaho Code § 58-1301. Pursuant to the Regulation of Beds, Waters, and Airspace over Navigable Lakes in the State of Idaho, IDAPA 20.03.04.030.02,

[e]ncroachments not in aid of navigation in navigable lakes will normally not be approved by the Department and will be considered only in cases involving major environmental, economic, or social benefits to the general public. Approval under these circumstances is authorized only when consistent with the public trust doctrine and when there is no other feasible alternative with less impact on public trust values.

IDAPA 20.03.04.030.02.<sup>4</sup> Thus, Mr. Hudson’s encroachment is of the type that would be approved only in very unusual circumstances, which are not present here. Rule 30.02 was identical in 1998 (*See* Idaho Office of the Administrative Rules Coordinator, Department of Lands 1998 Archive, 20.03.04.000, <http://adminrules.idaho.gov/rules/1998/20/0304.pdf> (last visited June 10, 2016)) which is shortly after Mr. Hudson states that he began the subject fill activities. In other words, Rule 30.02, expressing the policy that nonnavigational encroachments will rarely be approved, was in place sixteen years before Mr. Hudson alleges that he concluded his fill activities.

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<sup>4</sup> While the current version of IDAPA 20.03.04.30.02 was amended slightly in 2008,

Therefore, pursuant to Idaho Code § 58-1309, this court should direct that Mr. Hudson remove the subject fill and restore that area of Priest Lake “to as near its condition immediately prior to the unauthorized encroachment as possible . . .” I.C. § 58-1309.

**E. The Court Should Impose a Civil Penalty.**

The LPA provides for civil penalties, up to \$10,000 per violation. I.C. § 58-1308. Mr. Hudson argues that a civil penalty is inappropriate, because the fill has allegedly existed for 20 years, and because he argues that he acted in good faith. Given the fill’s temporal and physical proximity to the dock for which Mr. Hudson obtained an Encroachment Permit (*see* Subsection C, above), any assertion that he acted in good faith is suspect. In addition, Mr. Hudson has stated that he continued to work on the fill through 2014 (Hudson Dec., ¶ 9), which means that the fill has *not* been in existence for twenty years.

**F. Most of the Warner Declaration Should Be Disregarded.**

The State is filing a separate Motion to Strike Portions of the Warner Declaration and Memorandum in Support concurrently herewith (“Motion to Strike”), and incorporates the arguments set forth in the Motion to Strike herein. Mr. Warner has not demonstrated that he is qualified to testify or render opinions on many of the matters set forth in his declaration, including the hydrology of Priest Lake, hydrology in general, the location of the vegetation line at Priest Lake at any point in time, the growing season at Priest Lake, or whether the 1900 Bonser Survey was in fact conducted in accordance with the applicable Manual of Surveying, or *any* applicable manual or regulation. He also admits that Exhibits C and D to his Declaration are for illustrative purposes only, rendering them unhelpful to the trier of fact and otherwise inadmissible.



In addition, it is important to correct the record before the court regarding an assertion made in the *Warner Affidavit*. At Paragraph 11, Mr. Warner cites *In Re: Sanders Beach*, 143 Idaho 443, 450, 147 P.3d 75, 82 (2006) as standing for the broad proposition that “[d]ams do not lower the lake level of a given waterway. Dams increase the elevation of the lake level of a given waterway.” *Warner Aff.*, ¶ 11. That is a broad mischaracterization of the *Sanders Beach* holding. First, the waterbody at issue in that case was Lake Coeur d’Alene, not Priest Lake, and the court’s holding was specific to Lake Coeur d’Alene. Second, after reviewing previous cases concerning Lake Coeur d’Alene, the court simply held that the OHWM of Lake Coeur d’Alene could not have been higher before the dams were constructed than it was after.

The above history simply shows that the dams completed in 1907 did not lower the ordinary high water elevation of the waters of Lake Coeur d’Alene. It was not higher before the dams were constructed than it was afterwards. After the dams were completed, the ordinary high water mark has been at 2128 feet above mean sea level. [Citations omitted]. That is the highest it could have been in 1890.

*In Re: Sanders Beach*, 143 Idaho at 450, 147 P.3d at 82. The court did not hold that dams necessarily increase the elevation or the OHWM of a given waterway.<sup>5</sup> In addition, whether 2437.64 msl is the OHWM or AHW is simply irrelevant to the State’s Motion.

The remainder of the Warner Declaration pertains primarily to whether 2437.64 msl is the OHWM or AHW, and is therefore irrelevant to this Motion. The State does not concede any of the statements made in the Warner Declaration, nor does it concede that Mr. Warner is qualified to render the opinions set forth therein.

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<sup>5</sup> In fact, Idaho Code § 70-501 can be read to contemplate that the purpose of the Priest Lake Outlet Dam was to maintain access to existing amenities for a longer period of time, or in the words of the statute to “regulate the level of Priest Lake . . . at a level which will preserve for the use of the people the beach, boating and other recreational facilities which are now located on said lake.” I.C. § 70-501 (emphasis added).

## CONCLUSION

For the reasons set forth herein, as well as the State's Memorandum in Support, and as supported by the affidavits filed by the State in this matter, the State respectfully requests that the Court grant its Motion for Partial Summary Judgment.

DATED this 14th day of June, 2016.

for


  
ANGELA SCHAER KAUFMANN  
Deputy Attorney General  
Idaho Department of Lands

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of June 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

JOHN MAGNUNSON  
1250 NORTHWOOD CENTER CT STE A  
COEUR D'ALENE ID 83816

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivery
- ☒ Federal Express
- ☐ Facsimile: (208) 667-0500
- ☒ E-Mail:

  
ANGELA SCHAER KAUFMANN  
Deputy Attorney General  
Idaho Department of Lands



LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division

ANGELA SCHAER KAUFMANN, ISB # 5436  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
PO Box 83720  
Boise, ID 83720-0010  
Tele: (208) 334-4120  
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STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DISTRICT

15 JUN 17 A 11:59

CLERK DISTRICT COURT

*[Signature]*  
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Counterclaim Defendants.

Case No. CV 2015-1075

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the hearing on the *State of Idaho's Motion to Strike Portions of the Declaration of Ernest M. Warner, PLS* filed in the above-referenced matter on June 15, 2016, is set for **June 22, 2016, at 3:30 p.m. (PDT) at the Bonner County District Court, 215 S. 1<sup>st</sup> Avenue, Sandpoint, Idaho.**

DATED this 17<sup>th</sup> day of June, 2016.

for :

  
ANGELA SCHAER KAUFMANN  
Deputy Attorney General  
Idaho Department of Lands

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17<sup>th</sup> day of June, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

JOHN MAGNUSON  
1250 NORTHWOOD CENTER CT STE A  
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for:

  
ANGELA SCHAER KAUFMANN  
Deputy Attorney General  
Idaho Department of Lands



JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
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Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

Attorney for Defendant/Counterclaim  
Plaintiff Philip Hudson



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

---

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Counterclaim Defendants.

NO. CV-15-1075

**MEMORANDUM IN OPPOSITION  
TO MOTION TO STRIKE THE  
DECLARATION OF ERNEST M.  
WARNER, PLS**

COMES NOW Defendant/Counterclaim Plaintiff Philip Hudson, by and through his attorney of record, John F. Magnuson, and respectfully submits this Memorandum in opposition to the Plaintiffs' "Motion to Strike Portions of the Declaration of Ernest M. Warner, PLS." This Memorandum is supported by the pleadings and submissions on file herein.

### **I. PROCEDURAL BACKGROUND.**

On April 18, 2016, the Plaintiff moved for partial summary judgment. The Plaintiffs' Motion was supported in part by the Affidavits of Mick Schanilec and Matthew Anders (both filed April 18, 2016).

Defendant filed and served opposing materials which included the Declaration of Ernest M. Warner, PLS. On June 15, 2016, Plaintiffs moved to strike portions of the Declaration of Ernest M. Warner, PLS (hereafter "the Warner Declaration). Plaintiffs asked that the following portions of the Warner Declaration be stricken: Paragraphs 9-16, 23-26, 28-33, and 35-36, as well as Exhibits A and C.

For the reasons set forth herein, said Motion should be denied.

### **II. WARNER'S CREDENTIALS.**

As set forth more fully in the Warner Declaration, Warner has forty-three (43) years of surveying experience and has been licensed as a Registered Professional Landsurveyor in the State of Idaho for thirty-four (34) years. He maintains dual licensure in the State of Washington.

Warner has served as a faculty member at North Idaho College on a continuous basis since 1998, teaching surveying principles. Warner has further pursued continuing education regarding surveying, riparian and littoral rights, boundary resolutions, and similar matters.

Warner has also previously offered expert testimony involving the location of littoral rights in the establishment of ordinary high water marks in two (2) seminal proceedings: Erickson v. State, 132 Idaho 208, 970 P.2d 1 (1998), and In Re Sanders Beach, 143 Idaho 443, 147 P.3d 75 (2006). Finally, Warner is a past-President of the Idaho State Association of Professional Land Surveyors and a former Chairman of the Northern Section of the Idaho Society of Professional Land Surveyors.

For purposes of expressing the opinions contained in his Declaration, Warner reviewed and considered the following information: matters of record title, including a copy of the original Government Land Office (GLO) Survey of Priest Lake, contemporaneous instructions given to the original GLO surveyor, and subsequent surveys; his observations of survey monuments; the relevant chain of title to the Hudson parcel; aerial maps of the property in dispute; his observations of evidence of the physical features of the Defendant's property and neighboring properties; and the Affidavits of Mick Schanilec and Matthew Anders (which were filed by the Plaintiffs in this proceeding). In addition to the foregoing, Warner relied upon his education, training, and experience as a professional land surveyor in his analysis of the foregoing information in order to aid and assist in the preparation and expression of the opinions set forth in his Declaration.

### **III. ARGUMENT.**

#### **A. Plaintiffs' Motion to Strike Paragraph 9 of the Warner Declaration Should Be Denied.**

Paragraph 9 of the Warner Declaration provides as follows:

9 . The State of Idaho owns in trust for the public title to the bed of navigable waters below the ordinary high water mark (OHWM) as it existed at the time Idaho was admitted into the Union (July 3, 1890). See, e.g., Erickson v. State, 132 Idaho 208, 210 (1998).



See Declaration of Warner at p. 3. Paragraph 9 was specifically included in that portion of the Declaration headed “BACKGROUND FACTS REGARDING ELEVATION LEVELS OF PRIEST LAKE.”

Plaintiffs suggest that it “is unclear whether Mr. Warner is offering his opinion testimony regarding the OHWM as a lay witness or an expert witness . . . .” See Plaintiffs’ Motion at p. 2. To dispel any misconceptions, Mr. Warner’s opinions are offered as expert testimony.

Plaintiffs contend that Mr. Warner is not competent to testify as an expert witness regarding matters pertinent to establishing an OHWM in the State of Idaho. This contention is without merit. The location of an OHWM requires various levels of knowledge, including knowledge pertinent to surveying, boundaries, the establishment of elevations, and the like. Plaintiffs claim that Mr. Warner has not “demonstrated that he has the expertise necessary to interpret gage data.” As can be seen from the Warner Declaration, he is assuming that the gage data offered by Plaintiffs, through its very own submissions (the Affidavit of Matthew Anders), is correct. Are Plaintiffs now suggesting that Mr. Anders’ interpretation of gage data, assumed correct and relied upon by Mr. Warner, is not in fact correct?

As to Mr. Warner’s prior testimony in Erickson v. State and In Re Sanders Beach, Plaintiffs correctly infer that Mr. Warner offered testimony on behalf of those parties represented by Mr. Hudson’s current counsel. Those parties included the Plaintiffs (Marvin and Sharon Erickson) in Erickson v. State and the Defendant property owners in In Re Sanders Beach (who successfully prevailed on appeal). The testimony offered by Mr. Warner in both cases, whether at trial or by affidavit, was similar in nature to the testimony offered through his Declaration in this proceeding.

Turning with specificity to Paragraph 9, Defendant Hudson again notes that the Paragraph is offered (as are Paragraphs 9 through 16) under the heading “BACKGROUND FACTS REGARDING ELEVATION LEVELS OF PRIEST LAKE.” IRE 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. . . .

See IRE 703. What Mr. Warner has set forth in Paragraphs 9 through 16 are “background facts” that he considered in the formulation of his opinions, in addition to the information described in Paragraph 7 of his Declaration.

It borders on the absurd for the State to move to strike Paragraph 9, which acknowledges that “the State of Idaho owns in trust for the public title to the bed of navigable waters below the ordinary high water mark (OHWM) as it existed at the time Idaho was admitted into the Union (July 3, 1890).” This is a statement of fact, and Mr. Warner cited the source of the fact (Erickson v. State, 132 Idaho, 208, 210 (1998)). Mr. Warner considered the fact in the formulation of the opinions he expressed in his Declaration. There is no cogent basis to strike a foundational paragraph pre-requisite to an expert’s expression of his opinion.

**B. Plaintiffs’ Motion to Strike Paragraph 10 of the Warner Declaration Should Be Denied.**

Paragraph 10 of the Warner Declaration states as follows:

10. A dam was constructed by the State of Idaho, at the outlet of Priest Lake, in approximately 1950. See Affidavit of Matthew Anders at ¶11. The dam was first used for water storage on August 9, 1950. Id.

See Declaration of Warner at p. 3. For the reasons set forth above in the context of Paragraph 9,

Plaintiffs' Motion to Strike Paragraph 10 should be denied. Warner has set forth facts that he considered in the formulation of his opinion. Those facts are properly presented to the Court in light of IRE 703. What makes the objection all the more incredulous is that Mr. Warner has cited "facts" that he relied upon which were furnished under oath by an Affiant of the State (Matthew Anders). Mr. Anders averred under oath that the Priest Lake dam was constructed in approximately 1950 and that the dam was first used for water storage on August 9, 1950. Even the Plaintiffs acknowledge that both statements are true. Mr. Warner accepted the same as true for purposes of expressing his opinions and no cogent objection can be made to the same.

**C. Plaintiffs' Motion to Strike Paragraph 11 of the Warner Declaration Should Be Denied.**

Paragraph 11 of the Warner Declaration states as follows:

11. Dams do not lower the lake level of a given waterway. Dams increase the elevation of the lake level of a given waterway. See In Re: Sanders Beach, 143 Idaho at 443, 450 (2006). In other words, the ordinary high water mark of a given waterway (determined as of the date of statehood) is not higher before the dam was constructed than it was afterwards. Id.

See Declaration of Warner at p. 3. Mr. Warner has cited as fact a proposition attributed to the Supreme Court in In Re: Sanders Beach, 143 Idaho at 450. The case says what it says. The Plaintiffs and the Court can review the same. Mr. Warner has cited the Court's statement in In Re: Sanders Beach as a fact that he relied upon in the formulation of his opinions. For the reasons previously stated, the Motion to Strike should be denied. This is particularly true here, where, Plaintiffs deny the fact that dams apparently impound water that raises a lake elevation above and beyond its pre-dam elevation.



**D. Plaintiffs' Motion to Strike Paragraph 12 of the Warner Declaration Should Be Denied.**

Paragraph 12 of the Warner Declaration states as follows:

12. The dam constructed at the outlet of Priest Lake and utilized for water impoundment purposes from and after August 9, 1950 has maintained the level of Priest Lake at an elevation of 2437.64 feet msl (NGVD 1929), as measured on the Outlet gage, in July, August, and September, on an annual basis, since 1951. See Affidavit of Matthew Anders at ¶19.

See Declaration of Warner at p. 3. For the reasons stated above, the objection should be denied. The facts are taken directly from an Affidavit offered by the State. These are facts relied upon by Mr. Warner. One would be hard-pressed to believe that the State would offer facts, the veracity of which the State would later question.

**E. Plaintiffs' Motion to Strike Paragraphs 13-16 of the Warner Declaration Should Be Denied.**

Paragraphs 13 through 16 of the Warner Declaration state as follows:

13. In simple terms, since the dam became fully operational in 1951, water has been impounded in Priest Lake every year, for July, August, and September, at an elevation of 2437.64 feet msl (NGVD 1929). Prior to construction of the dam, the level of Priest Lake would have naturally receded below 2437.64 feet during the months of July, August, and September.

14. Attached hereto as Exhibit A is a true and correct copy of Exhibit E to the Affidavit of Matthew Anders, with interlineations I have placed on the same. Mr. Anders identified Exhibit E as a hydrograph that was "created by averaging all lake level heights on a given day for the periods 1930-1950 (pre-dam) and 1951-2015 (post-dam), then plott[ed] ... on the graph." See Affidavit of Matthew Anders at ¶15.

15. On the copy of Exhibit E attached hereto as Exhibit A, I have identified the elevation levels of Priest Lake that correspond to the gage heights as expressed therein. For example, a gage height of 3.0 equates to a lake elevation of 2437.64. This is the elevation at which the lake has been maintained from July through September of every year from 1951 based upon the operations of the dam.

16. Exhibit A also shows the corresponding lake elevations derived from gage readings before the dam became operational (from 1930 through 1950). Based upon Mr. Anders' affidavit, the data from 1890 through 1930, to the extent that it even exists, is fragmentary.

See Declaration of Warner at p. 4.

As the Court can glean from Paragraphs 13 to 16, Mr. Warner accepted as true the "daily average stage" of Priest Lake as offered by Matthew Anders. There should be no question on the part of the State as to the authenticity of an Exhibit its own Affiant prepared. Mr. Warner has placed corresponding elevation readings on the hydrograph which are also beyond challenge. The elevation correlations placed on the Exhibit by Mr. Warner are within his specific areas of expertise, including surveying. Mr. Warner accurately described Exhibit A as consisting of a hydrograph that was prepared by Mr. Anders. Mr. Anders described the same as a hydrograph that was "created by averaging all lake level heights on a given day for the periods 1930 to 1950 (pre-dam) and 1951 to 2015 (post-dam), then plott[ed] . . . on the graph." See Warner Declaration at Paragraph 14 (quoting the Affidavit of Matthew Anders at Exhibit A).

For the reasons set forth above, Mr. Warner has simply placed before the Court objectively irrefutable facts, identifying the source of the same, so as to disclose the information he relied upon in the formulation and expression of his opinions. There is no cogent or proper basis to object to or strike the same.

Plaintiffs object to Exhibit A, which is actually a copy of a hydrograph introduced as Exhibit E to the Anders Affidavit. Plaintiffs also object to Warner's interlineation of elevation levels on the Exhibit. In actuality, the elevation levels come from the Anders Affidavit that authenticated Exhibit E in the first place.



19. Exhibit E shows the effect that the outlet dam has had on the hydrograph of Priest Lake during the summer months. Before 1950, the water level of Priest Lake dropped throughout the summer from high levels in spring to low levels in the fall, and then would stay relatively low until spring snow melt and runoff. After 1950, normal high water was allowed to recede only to the 3.0 feet Outlet gage level and was maintained at this level throughout the summer by the Outlet dam as directed by Idaho Code Section 70-507. After 1950, the water was allowed to drop in October, and the normal low water of the lake was again attained. Thus, according to the hydrograph and the hydrologic data, the elevation of Priest Lake has been maintained at or near 3.0, or 2437.64 feet MSL (NGVD 1929), on the Outlet gage in July, August, and September annually since 1951.

See Anders Affidavit at ¶ 19 (emphasis added).

Plaintiffs further challenge Warner's Exhibit A (Anders' Exhibit E) because Warner has placed vertical lines between April 1 and September 1, labeling the same as "growing season." According to Plaintiffs, Warner "does not provide the basis for the dates he used for the growing season, nor has he demonstrated that he is competent to testify about the growing season in the Priest Lake area."

Certain facts are within the purview of all persons, regardless of expertise. The sun rises in the east. Warner does not need to be an expert to testify as to the same. The sun sets in the west. Warner need not be an expert to testify to the same.

All people in Bonner County recognize that vegetation grows between April and September. Warner's demarcations on Exhibit A to this Declaration are intended to illustrate historic lake level elevation readings (provided by the State's own expert) during the period of the year when vegetation grows in Bonner County. Pursuant to IRE 201(b), a court may judicially notice facts generally known within the territorial jurisdiction of the trial court. Moreover, pursuant to IRE 201(c), a court may take judicial notice, whether requested or not, at any stage of the proceeding. It is far from compelling for the State to try to call into question Mr. Warner's competence to observe



that vegetation grows in Bonner County during the period from April 1 to September 1.

**F. Plaintiffs' Motion to Strike Paragraph 23 of the Warner Declaration Should Be Denied.**

Paragraph 23 of the Warner Declaration states as follows:

23. The 1894 Manual of Surveying directed the surveyor to locate the meander line consistent with the then-existing ordinary mean high water mark which, in Idaho, coincides with the vegetation line. Thus, the existing vegetation line, at the time of the survey, was to form the basis for locating the sinuosity of the shore.

See Declaration of Warner at p. 6. The State has moved to strike the same.

Paragraph 23 must be read in the context of Paragraph 22 (which the State has not moved to strike). Paragraph 22 states as follows:

22. Attached hereto as Exhibit B is a true and correct reprint of excerpts of the 1894 Manual of Surveying utilized for purposes of surveying the public lands of the United States. I am familiar with the instructions attached hereto as Exhibit B and have utilized them for purposes of offering expert opinion as to the location of meander lines on multiple prior occasions.

In Paragraph 23, Warner is offering testimony as to the surveying instructions in place at the time of the original GLO survey of Priest Lake (on September 7, 1900). Again, he is setting forth facts of which he is aware, within his particular area of expertise, which are otherwise proper and admissible, both independently and under IRE 703.

**G. Plaintiffs' Motion to Strike Paragraph 24 of the Warner Declaration Should Be Denied.**

Paragraph 24 of the Warner Declaration states as follows:

24. Accordingly, while the physical location of the meander line is not in and of itself a boundary, the location of a given meander line on an inland navigable lake has independent historical significance because the GLO surveyor was instructed, on a particular date (in this case, September 7, 1900), to place the meander line where the vegetation line existed.

See Declaration of Warner at p. 6. Paragraph 24 must be read in the context of Paragraphs 22 and 23 (both set forth above). Warner offers testimony that (1) a meander line is not a boundary line, but (2) on a given day (September 7, 1900), Robert Bonser was instructed to locate a meander line consistent with the vegetation line. Accordingly, Warner offers his opinion that the vegetation line as of September 7, 1900 (unquestionably before the dam), was located waterward of the current summer level and inferentially where the vegetation line existed. Warner is competent to offer the foregoing testimony based upon his knowledge and expertise as a surveyor.

**H. Plaintiffs' Motion to Strike Paragraph 25 of the Warner Declaration Should Be Denied.**

Paragraph 25 of the Warner Declaration states as follows:

25. For purposes of this proceeding, although there may be no reliable lake elevation readings prior to 1930, we do know where the GLO surveyor placed the meander line, based upon existing vegetation, on September 7, 1900, ten years after Statehood.

See Declaration of Warner at p. 6. Warner states in Paragraph 25 that there were no reliable lake elevation readings prior to 1930. Warner confirmed this information through his review of the Anders Affidavit, wherein the State's own expert stated the same ("Data from June 11 to September 1913 and from April 28 to September 29 are fragmentary, so they were not used in calculating daily average stage values."). See Anders Affidavit at Paragraph 14. As to the remainder of Paragraph 25, the objection is puzzling. The GLO surveyor (Robert Bonser) did in fact complete a survey on September 7, 1900, ten (10) years after Statehood, following instructions to follow a vegetation line, and the line "is where it is." It matters not that Bonser's meander line is not a boundary. He still put the line where he put it and the Court can draw its own reasonable inferences.



**I. Plaintiffs' Motion to Strike Paragraph 26 and Exhibit C of the Warner Declaration Should Be Denied.**

Paragraph 26 of the Warner Declaration states as follows:

26. Attached hereto as Exhibit C is an exhibit I have prepared for illustrative purposes. Exhibit C consists of an aerial photograph of the portion of Priest Lake including Defendant Hudson's property (shown with an arrow on Exhibit C). This exhibit is offered simply to illustrate the point that the meander line bordering the Hudson parcel is not coexistent with the current summer elevation of the lake. The photograph was obtained from the records of Bonner County. The photograph shows, for general illustrative purposes, the location of the summer level of Priest Lake which is maintained at elevation 2437.64 by the subject dam. Exhibit C also overlays, for general illustrative purposes, the approximate location of the GLO meander line as determined on September 7, 1900 by Robert Bonser. This line is the line paralleling the shore of the subject property some distance out into the lake. Exhibit C is an attempt to illustrate the fact that there is a discernible distance between the summer level of Priest Lake as artificially maintained from July through September at elevation 2437.64 and the location of the meander line as physically determined by Robert Bonser on September 7, 1900 (who employed a pre-dam vegetation test).

See Declaration of Warner at p. 6. As noted, the Exhibit is offered for illustrative purposes. The objection goes to the weight of the Exhibit and not to its admissibility. The Exhibit simply demonstrates that a vegetation-based meander line was fixed waterward of the current summer level of Priest Lake some forty (40) years before the dam was constructed.

**J. Plaintiffs' Motion to Strike Paragraphs 28-33 and 35-36 of the Warner Declaration Should Be Denied.**

Paragraphs 28 through 33 and 35 and 36 of the Warner Declaration state as follows:

28. Prior to the operation of the dam, the elevation of Priest Lake generally receded, during the summer growing season (August 1), to an elevation two vertical feet lower than the summer elevation maintained by the dam since 1951.

29. The elevation of Priest Lake, prior to the operation of the dam at the outlet of Priest Lake, generally receded during the growing season (September 1) to an elevation approximately 2.3 vertical feet lower than the level currently maintained by the dam during summer months.



30. The original GLO meander line, as of September 7, 1900, some 50 years prior to construction of the Priest Lake dam, was to be located, pursuant to the Manual of Surveying Instructions then in effect, at the ordinary mean high water mark as evidenced by the vegetation line.

31. The original GLO meander line, although not constituting a boundary line in and of itself, is located in a manner that has independent factual and historical significance in that it evidences a vegetation line at an elevation lower than the artificial summer elevation maintained since 1951.

32. Actual measurements taken and memorialized at lots neighboring the Hudson lot reveal a slope waterward of the Hudson parcel (extending below elevation 2437.64 (the summer elevation)), of approximately one foot of elevation change for each nine and one-half feet of horizontal distance.

33. By artificially raising the elevation level of Priest Lake during the summer growing season by two vertical feet, the dam has had the effect of raising the lake elevation to cover approximately 19 more feet of the Hudson property, all of which now lies below elevation 2437.64 from July through September.

...

35. I believe and conclude, based upon the information and opinions expressed herein, that the ordinary high water mark of Priest Lake, as of July 3, 1890, was at least two vertical feet lower than elevation 2437.64 (the artificial level now maintained from July through September) and perhaps as much as 2.3 vertical feet lower.

36. It is my further opinion that most, if not all, of the Hudson improvements depicted on Exhibit D in yellow would be located upland of the ordinary high water mark as located pursuant to my opinion. Further specific on-site measurements, in lower water, will confirm with specificity the extent of any encroachments placed waterward of an OHWM of 2435.64 or lower. Nonetheless, based upon the information described herein, and currently known, nearly all of the improvements depicted on Exhibit D are above the location of the OHWM to which I have opined.

See Declaration of Warner at pp. 7-8. The subject paragraphs set forth some, but not all of, Warner's opinions.

Warner has established the facts he relied upon (despite the State's attempt to strike from his Declaration his simple recitation of the facts he relied upon) and his expertise. Further, much of the information relied upon by Warner irrefutably comes from the State's own submissions or pronouncements of fact from the Idaho Supreme Court in similar contexts. Having adequately laid a foundation for his opinions and qualifications, Warner's opinions stand. Defendant Hudson understands and appreciates that the State does not like Mr. Warner's opinions. However, the simple fact that the State does not like Mr. Warner's opinions is not a sufficient basis to strike them. They are admissible. The State is free to cross-examine Mr. Warner at trial. The State is free to offer such other admissible evidence, in a timely manner compliant with the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence, to attempt to discredit Mr. Warner's opinions. However, the simple fact that Mr. Warner's opinions run directly contrary to the world as viewed by the State is not a sufficient basis to strike them.

**K. Plaintiffs' Motion to Strike Paragraph 32 of the Warner Declaration Should Be Denied.**

Paragraph 32 of the Warner Declaration states as follows:

32. Actual measurements taken and memorialized at lots neighboring the Hudson lot reveal a slope waterward of the Hudson parcel (extending below elevation 2437.64 (the summer elevation)), of approximately one foot of elevation change for each nine and one-half feet of horizontal distance.

See Declaration of Warner at p. 7. The State claims Warner lacks foundation in expressing the opinions contained in Paragraph 32. The basis for Warner's opinions, conclusions, and observations was set forth in Paragraph 7, and included Warner's review of surveys, survey monuments, aerial maps, and observations of evidence of the physical features of the Defendant's property and neighboring properties. Warner is competent to testify as to the slope of the neighboring properties

and the fact that the slope seems consistent with that evidenced by the Hudson property. The objections of the State go to the weight and not the admissibility of Warner's opinions.

#### **IV. CONCLUSION.**

The State's Motion to Strike the cited portions of the Warner Declaration is not well-grounded. For the reasons set forth above, Warner's Declaration and Exhibits are admissible. The Court is, as always, free to give whatever weight it deems appropriate to Warner's testimony, as well as the testimony of the State's experts, including the State's contention that there is no artificial high water mark on Priest Lake. In point of fact, the only opinion that should really be questioned is the opinion of someone employed by the State who observes a dam, constructed to hold back water, and then offers an opinion that the dam doesn't affect the lake level

DATED this 17<sup>th</sup> day of June, 2016.



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JOHN F. MAGNUSON  
Attorney for Defendant/Counterclaim Plaintiff

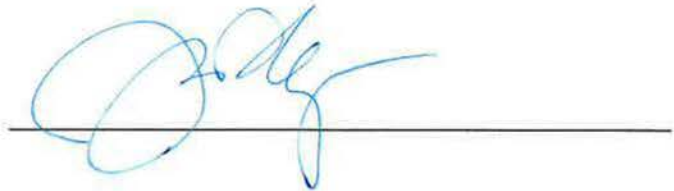


CERTIFICATE OF SERVICE

I hereby certify that on this 17<sup>th</sup> day of June, 2016, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Angela Schaer Kaufmann, Esq.  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
P.O. Box 83720  
Boise, ID 83720

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HUDSON-STRIKE-OPP.BRF.wpd

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division

ANGELA SCHAER KAUFMANN, ISB # 5436  
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FILED  
JUN 20 2016  
CLERK DISTRICT COURT  
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE BOARD OF LAND )  
COMMISSIONERS and IDAHO DEPARTMENT OF )  
LANDS, )

Plaintiffs, )

vs. )

PHILIP HUDSON, )

Defendant. )

PHILIP HUDSON, )

Counterclaim Plaintiff, )

vs. )

STATE OF IDAHO, IDAHO STATE BOARD OF LAND )  
COMMISSIONERS and IDAHO DEPARTMENT OF )  
LANDS, )

Counterclaim Defendants. )

Case No. CV 2015-1075

STATE'S RESPONSE TO  
DEFENDANT'S MOTION TO  
STRIKE THE SECOND  
AFFIDAVIT OF MICK  
SCHANILEC

The State of Idaho, the State Board of Land Commissioners and the Idaho Department of Lands (collectively, "State"), by and through their attorneys of record the Idaho Office of the Attorney General, hereby submit this Response to Defendant's Motion to Strike the Second Affidavit of Mick Schanilec ("Response"). The Second Affidavit of Mick Schanilec was timely filed in reply to the Defendant's Memorandum in Opposition to State's Motion for Partial Summary Judgment.

### **PERTINENT FACTS**

The State filed its Motion for Summary Judgment with an accompanying Memorandum in Support and the Affidavits of Mick Schanilec and Matt Anders on April 18, 2016, with this matter originally set for hearing on May 18, 2016. The hearing date was subsequently moved to June 22, 2016, and Mr. Hudson filed his Memorandum in Opposition along with the Declarations of Philip Hudson; Ernest M. Warner, PLS; and Drew C. Dittman, P.E., on June 9, 2016. The State then filed its Reply Memorandum and the Second Affidavit of Mick Schanilec on June 15, 2016, seven days before the hearing on the State's Motion for Summary Judgment.

### **PERTINENT LEGAL STANDARDS**

Idaho Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavit, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c) (emphasis added). Idaho Rule of Civil Procedure 56(e) sets forth the requirements for affidavits filed in support of or opposition to a motion for summary judgment, and provides that "[t]he court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." I.R.C.P. 56(e).



### ARGUMENT

In accordance with I.R.C.P. 56(c), the State's summary judgment reply was due on June 15, 2016, which is seven (7) days before the summary judgment hearing. Mr. Hudson does not argue that the State's briefing was untimely. Instead, he incorrectly argues that I.R.C.P. 56(c) does not permit parties to file reply affidavits in connection with a summary judgment proceeding.

Rule 56(e) provides that the court may allow affidavits to be supplemented or opposed in a variety of ways, including via further affidavits. I.R.C.P. 56(e). Paragraphs 1-3 of the Second Schanilec Affidavit are simply a restatement of Paragraphs 1-3 of his first Affidavit. Paragraph 4 verifies the color copies of Exhibits B, C and D as attached to the Second Schanilec Affidavit, which were erroneously attached in black and white to the first Schanilec Affidavit. At most, Paragraph 4 and Exhibits B, C and D are a supplementation to the first Schanilec Affidavit. The State further notes that Exhibits E and H to the Second Schanilec Affidavit are the same as Exhibits B and C, respectively, without the hand-drawn yellow line.

In addition, Paragraphs 6 through 12 and Exhibits E through J constitute a further affidavit, filed in opposition to certain contentions made in the Declaration of Philip Hudson, including but not limited to Paragraphs 8, 9, 10 and 16. They are also filed in opposition to contentions made in Exhibit A to the Declaration of Drew Dittman, P.E., and factual assertions made on page 8 of Mr. Hudson's Memorandum in Opposition.

Specifically, in his affidavit, Mr. Hudson asserted that he used and placed materials that were naturally occurring from lands contiguous to the beach area. Exhibits F, H, I and J, to the Second Schanilec Affidavit are offered in opposition to that contention as they show the presence of concrete and paver stones, neither of which is likely to be naturally occurring in the area of


Mr. Hudson's property. Exhibits E through J were offered to supplement Exhibit A to the first Schanilec Affidavit, and to in opposition to Mr. Hudson's contention that he did not believe he was placing encroachments in or on the water or property of the State. *See Reply Memorandum in Support of State's Motion for Partial Summary Judgment*, p. 6-8.

Idaho Rule of Civil Procedure 56(e) provides that "[t]he court may permit affidavits to be supplemented or opposed by . . . further affidavits."); *see also Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 5, 981 P.2d 236, 241 (1999) (recognizing that affidavits may be filed as a supplement to an earlier factual showing, or in opposition to information submitted by an opposing party). Even in the Georgia federal case cited by Mr. Hudson, the court recognized that important distinction, holding that affidavits that "were submitted, specifically, for the limited purpose of responding to matters raised in responses filed by the opposing parties" were admissible. *Tishcon Corp. v. Soundview Communications, Inc.*, 2005 WL 6038743 (N.D. Georgia 2005) at \*8. The State filed the Second Schanilec Affidavit and Exhibits thereto as a supplement to his first Affidavit, and in opposition to the Declarations of Philip Hudson and Drew Dittman, P.E., and the Second Schanilec Affidavit should not be stricken.

### CONCLUSION

For the reasons set forth herein, the State respectfully requests that the Court deny the Defendant Philip Hudson's Motion to Strike the Second Affidavit of Mick Schanilec.

DATED this 20th day of June, 2016.

  
ANGELA SCHAER KAUFMANN  
Deputy Attorney General  
Idaho Department of Lands

**CERTIFICATE OF SERVICE**

I hereby certify that on this 20th day of June 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

JOHN MAGNUNSON  
1250 NORTHWOOD CENTER CT STE A  
COEUR D'ALENE ID 83816

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- ☐ Hand Delivery
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- ☒ Facsimile: (208) 667-0500
- ☒ E-Mail: john@magnusononline.com

  
ANGELA SCHAER KAUFMANN  
Deputy Attorney General  
Idaho Department of Lands



STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DISTRICT

2016 JUN 30 A 11:33

CLERK DISTRICT

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

**STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,**

**Plaintiffs,**

**vs.**

**PHILIP HUDSON,**

**Defendant.**

**CASE NO. CV-2015-0001075**

**MEMORANDUM DECISION AND  
ORDER GRANTING PLAINTIFFS'  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

**PHILIP HUDSON,**

**Counterclaim Plaintiff,**

**vs.**

**STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,**

**Counterclaim Defendants.**

THIS MATTER came before the Court on June 22, 2016, for a hearing on the State of Idaho's Motion for Partial Summary Judgment re: State of Idaho's First Claim for Relief, and Motion to Strike Portions of the Declaration of Ernest M. Warner, PLS; and Defendant's Motion to Shorten Time, and Motion to Strike the "Second Affidavit of Mick Schanilec." Plaintiffs State of Idaho, Idaho State Board of Land Commissioners and Idaho Department of Lands

(collectively, “State of Idaho”) are represented by Deputy Attorney General Angela Schaer Kaufmann. Defendant Philip Hudson is represented by attorney John F. Magnuson.

Both counsel and Mr. Hudson were present in the courtroom.

## I. INTRODUCTION

Priest Lake is a navigable lake located in Bonner County, Idaho. Priest Lake was a navigable lake at the time Idaho was admitted to the Union on July 3, 1890, and continued to be navigable from that date to the present. *Verified Complaint* (filed July 13, 2015), at ¶ 6; *Answer and Counterclaim* (filed September 21, 2015), at ¶¶ 2, 6,

In July 2014, the Idaho Department of Lands (“IDL”) investigated a complaint about an unauthorized encroachment in Priest Lake adjacent to the upland property owned by Philip Hudson. *Affidavit of Mick Schanilec* (filed April 18 2016), at ¶ 7. IDL reviewed historical aerial photos and noted what appeared to be a lakebed fill area consisting of an elevated beach and a sea wall adjacent to the Hudson property. *Id.* Hudson did not obtain a lake encroachment permit for this fill. *Id.* at ¶ 9. The fill consists of sand, soil, rocks, cement and seedlings that have either been planted or have seeded in since the establishment of the fill. *Id.* at ¶ 10. IDL has repeatedly attempted to have Hudson remove the unauthorized fill, but he has declined. *Id.* at ¶ 12.

On July 13, 2015, the State of Idaho, Idaho State Board of Land Commissioners (“Board”) and the IDL filed a Verified Complaint against Philip Hudson. The State, first, alleges a violation of the Lake Protection Act and seeks a mandatory injunction ordering the removal of the unauthorized fill; and second, alleges trespass on State lands and seeks permanent injunctive relief. Hudson counterclaimed. This case is set for a court trial to begin on November 29, 2016.

The State now moves for summary judgment on its first claim for relief.

## II. SUMMARY JUDGMENT STANDARD

In *Johnson v. McPhee*, 147 Idaho 455, 210 P.3d 563 (Ct. App. 2009), the Idaho Supreme Court set forth the standard for summary judgment, as follows:

**Summary judgment may be entered only if “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”** Idaho Rule of Civil Procedure 56(c). *See also Avila v. Wahlquist*, 126 Idaho 745, 747, 890 P.2d 331, 333 (1995); *Idaho Bldg. Contractors Ass’n v. City of Coeur d’Alene*, 126 Idaho 740, 742, 890 P.2d 326, 328 (1995). When a summary judgment motion has been supported by depositions, affidavits or other evidence, the adverse party may not rest upon the mere allegations or denials of that party’s pleadings, but by affidavits or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial. I.R.C.P. 56(e). *See also Gardner v. Evans*, 110 Idaho 925, 929, 719 P.2d 1185, 1189 (1986). In order to survive a motion for summary judgment the plaintiff need not prove that an issue will be decided in its favor at trial; rather, it must simply show that there is a triable issue. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 524, 808 P.2d 851, 861 (1991). **A mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment; there must be sufficient evidence upon which a jury could reasonably return a verdict for the party opposing summary judgment.** *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986); *Petricевич v. Salmon River Canal Co.*, 92 Idaho 865, 871, 452 P.2d 362, 368 (1969). ...

When a court considers a motion for summary judgment in a case that would be tried to a jury, all facts are to be liberally construed, and all reasonable inferences must be drawn in favor of the party resisting the motion. *G & M Farms*, 119 Idaho at 517, 808 P.2d at 854; *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994). **The rule is different however when, as here, a jury trial has not been requested. In that event, because the court would be the fact-finder at trial, on a summary judgment motion the court is entitled to draw the most probable inferences from the undisputed evidence properly before it, and may grant the summary judgment despite the possibility of conflicting inferences.** *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007); *Intermountain Forest Mgmt., Inc. v. Louisiana Pacific Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001); *Brown v. Perkins*, 129 Idaho 189, 191, 923 P.2d 434, 436 (1996). **Inferences thus drawn by a trial court will not be disturbed on appeal if the record reasonably supports them.** *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 360–61, 93 P.3d 685, 691–92 (2004); *Intermountain Forest Mgmt., Inc.*, 136 Idaho at 236, 31 P.3d at 924.

*Id.* at 459-460, 210 P.3d at 567-568. (Emphasis supplied).



### III. DISCUSSION

#### A. Defendant Hudson's lakebed fill is an encroachment not in aid of navigation.

Idaho Code § 58-1302 provides, in relevant part:

(h) "Encroachments in aid of navigation" means and includes docks, piers, floats, pilings, breakwaters, boat ramps, channels or basins, and other such aids to the navigability of the lake, on, in or above the beds or waters of a navigable lake. The term "encroachments in aid of navigation" may be used interchangeably herein with the term "navigational encroachments."

(i) "Encroachments not in aid of navigation" means and includes all other encroachments on, in or above the beds or waters of a navigable lake, **including landfills or other structures not constructed primarily for use in aid of the navigability of the lake.** The term "encroachments not in aid of navigation" may be used interchangeably herein with the term "nonnavigational encroachments."

I.C. § 58-1302(h), (i). (Emphasis supplied).

Similarly, Idaho Administrative Code 20.03.17.010, provides, in relevant part:

09. Encroachments in Aid of Navigation. Includes docks, piers, jet ski and boat lifts, buoys, pilings, breakwaters, boat ramps, channels or basins, and **other facilities used to support water craft and moorage on, in, or above the beds or waters of a navigable lake, river or stream.** The term "encroachments in aid of navigation" may be used interchangeably herein with the term "navigational encroachments."

10. Encroachments Not in Aid of Navigation. Includes all other encroachments on, in, or above the beds or waters of a navigable lake, river or stream, **including landfills, bridges, utility and power lines, or other structures not constructed primarily for use in aid of navigation.** It shall also include float homes and floating toys. The term "encroachments not in aid of navigation" may be used interchangeably herein with the term "non-navigational encroachments."

IDAPA 20.03.17.010 (09),(10). (Emphasis supplied).

Hudson's lakebed fill is not a facility that is "used to support water craft and moorage on, in, or above the beds or waters of a navigable lake, river or stream." IDAPA 20.03.17.010(09). Rather, it is a structure "not constructed primarily for use in aid of navigation," IDAPA 20.03.17.010(10). Therefore, the Court finds that it is an encroachment not in aid of navigation.

**B. The State of Idaho has the power to regulate and control navigational and nonnavigational encroachments.**

Under Idaho Code § 58-1303, the Board “shall regulate, control and may permit encroachments in aid of navigation or not in aid of navigation on, in or above the beds or waters of navigable lakes ....” I.C. § 58-1303. Applications for construction, enlargement or replacement of a nonnavigational encroachment must be made to the Board, as set forth in Idaho Code § 58-1306. If such application is approved, a permit shall be issued and recorded in the records of the county in which the encroachment is located. I.C. § 58-1306. Here, it is undisputed that Hudson did not obtain a permit for the lakebed fill.

**C. The bed of Priest Lake includes the land lying between the ordinary and artificial high water mark.**

It is undisputed that Priest Lake is a navigable lake. Idaho Code § 58-1302 defines the bed of a navigable lake, as follows:

“Beds of navigable lakes” means the lands lying under or below the “natural or ordinary high water mark” of a navigable lake and, for purposes of this act only, **the lands lying between the natural or ordinary high water mark and the artificial high water mark, if there be one.**

I.C. § 58-1302(b). (Emphasis supplied).

In his Memorandum in Opposition to the State of Idaho’s Motion for Partial Summary Judgment Re: First Claim for Relief, filed June 9, 2016, Hudson agrees that the State of Idaho owns in trust for the public title to the bed of Priest Lake below the Ordinary High Water Mark (OHWM) as it existed on July 3, 1890, but contends that there are material issues of fact as to the location of the OHWM as of that date. Hudson claims that an artificial high water mark (AHWM) is created by the dam during the summer months, and that the AHWM is higher than

the OHWM. Hudson argues that that the fill at issue in this case is located upland of the OHWM, on property not owned by the State, but on his property.

The Court finds that pursuant to the definition of a lakebed in Idaho Code § 58-1302, it does not matter whether the fill is located below the OHWM, or between the OHWM and the AHWM, if there is one; because the statute makes clear that the State of Idaho has the power to regulate and control encroachments on land lying between the OHWM and the AHWM.

Accordingly, the State of Idaho has the power, as a matter of law, to regulate and control encroachments in or above the bed of Priest lake by requiring that a lake encroachment permit be obtained before construction of a nonnavigational encroachment such as the fill at issue here.

\*\*\*\*\*

Construing all the undisputed facts liberally, and drawing the most probable inferences from the undisputed evidence in favor of Hudson,<sup>1</sup> the Court finds there is no genuine issue of material fact for trial as to the authority of the State of Idaho to require Hudson to apply for and obtain a permit for the construction of lakebed fill. Hudson having failed to obtain such a permit, the Court grants the State of Idaho's motion for partial summary judgment.

**D. The parties' Motions to Strike are moot.**

The Declaration of Ernest M. Warner, PLS, which the State of Idaho has moved to strike, and the Second Affidavit of Mick Schanilec, which Hudson has moved to strike, were not considered in reaching the Court's decision. Therefore, the motions to strike are moot.

**IV. CONCLUSION AND ORDER**

NOW, THEREFORE, based upon the foregoing, IT IS HEREBY ORDERED THAT:

---

<sup>1</sup> As noted earlier, this is the standard for a court trial. However, even applying the more liberal standard for a jury trial, i.e., drawing all *reasonable* inferences from the undisputed evidence in favor of Hudson, the result is the same.



1. The State of Idaho's Motion to Strike Portions of the Declaration of Ernest M. Warner is MOOT.
2. Defendant's Motion to Strike the Second Affidavit of Mick Schanilec is MOOT.
3. Defendant's Motion to Shorten Time is GRANTED.
4. The State of Idaho's Motion for Partial Summary Judgment re: State of Idaho's First Claim for Relief is GRANTED.

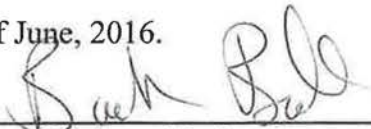
IT IS FURTHER ORDERED THAT:

5. A mandatory injunction shall issue ordering Defendant Hudson to:
  - a. Remove all unauthorized fill below the high water mark of Priest Lake, regardless of whether the high water mark is natural or artificial, during the low water period of Priest Lake (between November 1 and March 1);
  - b. Stabilize any unstable bank or lake bed remaining landward of the high water mark of Priest Lake, regardless of whether the high water mark is natural or artificial; and
  - c. Perform any other measures recommended by IDL designed to contain sediment and erosion and to restore the lake to as near its condition immediately prior to the unauthorized encroachment as possible.
6. A permanent injunction shall issue ordering Defendant Hudson to refrain from encroaching on, in, or above the beds or waters of Priest Lake, unless and until approval is obtained from IDL, as provided in the Lake Protection Act.

The State is ordered to prepare the proposed injunctions consistent with this Order, and to submit them to the Court for entry within (14) days of the date of this Order.

IT IS SO ORDERED

DATED this 30 day of June, 2016.

  
\_\_\_\_\_  
**Barbara Buchanan**  
**District Judge**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 30 day of June, 2016, to:

Angela Schaer Kaufmann  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
PO Box 83720  
Boise, ID 83720-0010

John F. Magnuson  
Attorney at Law  
1250 Northwood Center Court, Suite A  
P.O. Box 2350  
Coeur d'Alene, ID 83816

  
\_\_\_\_\_  
Deputy Clerk

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

FIRST JUDICIAL DISTRICT

2016 JUL 15 A 9:15

CLERK DISTRICT COURT

STATE OF IDAHO, IDAHO STATE BOARD OF LAND )  
COMMISSIONERS and IDAHO DEPARTMENT OF )  
LANDS, )

Plaintiffs, )

vs. )

PHILIP HUDSON, )

Defendant. )

PHILIP HUDSON, )

Counterclaim Plaintiff, )

vs. )

STATE OF IDAHO, IDAHO STATE BOARD OF LAND )  
COMMISSIONERS and IDAHO DEPARTMENT OF )  
LANDS, )

Counterclaim Defendants. )

Case No. CV 2015-1075

**MANDATORY AND  
PERMANENT INJUNCTIONS**

JUDGMENT IS ENTERED AS FOLLOWS:

This action having come before the Court on the State of Idaho's Motion for Partial Summary Judgment re: State of Idaho's First Claim for Relief, and the issues having been duly heard and a June 30, 2016 *Memorandum Decision and Order Granting Plaintiff's Motion for Partial Summary Judgment*, having been fully rendered,

IT IS ORDERED, ADJUDGED AND DECREED that Defendant Philip Hudson shall:



1. Remove all unauthorized fill below the high water mark of Priest Lake, regardless of whether the high water mark is natural or artificial, during the low water period of Priest Lake (between November 1 and March 1);
2. Stabilize any unstable bank or lake bed remaining landward of the high water mark of Priest Lake, regardless of whether the high water mark is natural or artificial; and
3. Perform any other measures recommended by the Idaho Department of Lands ("IDL") designed to contain sediment and erosion and to restore the lake to as near its condition immediately prior to the unauthorized encroachment as possible.

Defendant Philip Hudson is further hereby permanently enjoined from encroaching on, in, or above the beds or waters of Priest Lake, unless and until approval is obtained from IDL as provided in the Lake Protection Act, Title 58, Chapter 13, Idaho Code.

DATED this 14 day of July 2016.



**BARBARA BUCHANAN**  
District Judge

**CERTIFICATE OF SERVICE**

I hereby certify that on this 15<sup>th</sup> day of July 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Angela Schaer Kaufmann  
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Idaho Department of Lands  
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Boise, ID 83720-0100

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Deputy Clerk

JUL 20 2016 4:15PM  
JUL 20 2016 4:15PM

ATTORNEY GENERAL  
OFFICES

NO. 101 P. 2  
100 2/11 11 3

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division

ANGELA SCHAER KAUFMANN, ISB # 5436  
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STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DISTRICT

2016 JUL 20 P 4: 06

CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Counterclaim Defendants.

Case No. CV 2015-1075

STIPULATION FOR ENTRY  
OF RULE 54(B) JUDGMENT



Plaintiffs/Counterclaim Defendants the State of Idaho, Idaho State Board of Land Commissioners and Idaho Department of Lands (collectively, "State") by and through their attorney of record Angela Schaer Kaufmann, Deputy Attorney General, and Defendant/Counterclaim Plaintiff Philip Hudson, by and through his attorney of record John F. Magnuson, hereby stipulate and request that the Court enter a Partial Judgment pursuant to Idaho Rule of Civil Procedure 54(a) and (b) in the above captioned matter. Exhibit A is a proposed Judgment.

DATED this 20<sup>th</sup> day of July, 2016.

  
ANGELA SCHAER KAUFMANN  
Attorney for Plaintiffs/Counterclaim Defendants

DATED this 18<sup>th</sup> day of July, 2016.

  
JOHN F. MAGNUSON  
Attorney for Defendants/Counterclaim Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 20<sup>th</sup> day of July 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

JOHN MAGNUSON  
1250 NORTHWOOD CENTER CT STE A  
COEUR D'ALENE ID 83816

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- ☐ Federal Express
- ☒ Facsimile: (208) 667-0500
- ☐ E-Mail:

THE HONORABLE BARBARA BUCHANAN  
JUDGE OF THE BONNER COUNTY  
DISTRICT COURT  
JUDGE'S CHAMBERS  
215 S. FIRST AVENUE  
SANDPOINT, ID 83864

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (208)263-0896
- ☐ E-Mail

  
ANGELA SCHAER KAUFMANN  
Deputy Attorney General  
Idaho Department of Lands

## RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment and order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this 22 day of July, 2016.



**Barbara Buchanan**  
District Judge



RECEIVED CLERK OF COURT

With respect to the issues determined by the above judgment, the undersigned hereby certifies that the Court has considered the issues and has determined that there is no just reason for delay of the entry of judgment and that the Court has and does hereby direct that the above judgment and order shall be a final judgment, so that no intervention may be made and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this 22 day of July, 2016.

  
Barbara Buchanan  
District Judge

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division

ANGELA SCHAER KAUFMANN, ISB # 5436  
Deputy Attorney General  
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700 W. State Street, 2<sup>nd</sup> Floor  
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FAX: (208) 854-8072

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DISTRICT

2016 JUL 27 P 3:50

CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Counterclaim Defendants.

Case No. CV 2015-1075

STIPULATION FOR STAY OF  
FURTHER ACTION ON  
REMAINING CLAIMS AND  
COUNTERCLAIMS

STIPULATION FOR STAY OF FURTHER ACTION ON REMAINING CLAIMS AND  
COUNTERCLAIMS - PAGE 1

Plaintiffs/Counterclaim Defendants the State of Idaho, Idaho State Board of Land Commissioners and Idaho Department of Lands (collectively, "State") by and through their attorney of record Angela Schaer Kaufmann, Deputy Attorney General, and Defendant/Counterclaim Plaintiff Philip Hudson, by and through his attorney of record John F. Magnuson, hereby stipulate and request that the Court enter an Order Staying of Further Action on Remaining Claims and Counterclaims.

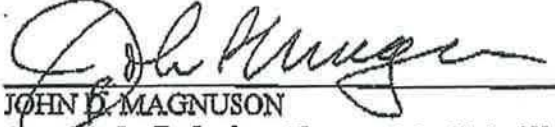
The Parties have filed a Stipulation for Entry of Rule 54(b) judgment. It is anticipated that Dr. Hudson will appeal the Court's decision on the State's motion for partial summary judgment. The Parties have agreed that to request that the Court stay further action on the remaining claims and counterclaims in the above-captioned matter until such time as the appeal is decided.

A [Proposed] Order is attached.

DATED this 27<sup>th</sup> day of July, 2016.

  
ANGELA SCHAER KAUFMANN  
Attorney for Plaintiffs/Counterclaim Defendants

DATED this 25<sup>th</sup> day of July, 2016.

  
JOHN F. MAGNUSON  
Attorney for Defendants/Counterclaim Plaintiffs



**CERTIFICATE OF SERVICE**


I hereby certify that on this 27<sup>th</sup> day of July 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

JOHN MAGNUSON  
1250 NORTHWOOD CENTER CT STE A  
COEUR D'ALENE ID 83816

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (208) 667-0500
- ☐ E-Mail:

THE HONORABLE BARBARA BUCHANAN  
JUDGE OF THE BONNER COUNTY  
DISTRICT COURT  
JUDGE'S CHAMBERS  
215 S. FIRST AVENUE  
SANDPOINT, ID 83864

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (208) 263-0896
- ☐ E-Mail

  
ANGELA SCHAER KAUFMANN  
Deputy Attorney General  
Idaho Department of Lands

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DISTRICT

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

PHILIP HUDSON;

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Counterclaim Defendants.

Case No. CV 2015-1075

**ORDER STAY OF FURTHER  
ACTION ON REMAINING  
CLAIMS**

*Amended*

The court having entered a Partial Judgment on July 28, 2016, and having certified the same pursuant to Idaho Rule of Civil Procedure 54(b), IT IS HEREBY ORDERED that further action on the remaining claims and counterclaims in the above-captioned matter is STAYED pending resolution of Defendant Hudson's appeal.

DATED this 28 day of July, 2016.

  
Barbara Buchanan  
District Judge

CERTIFICATE OF SERVICE


I hereby certify that on this 28 day of July 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

John Magnuson  
Attorney at Law  
1250 Northwood Center Court, Ste. A  
Coeur d'Alene, ID 83816

- ☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivery  
☐ Federal Express  
☐ Facsimile: (208) 667-0500  
☐ E-Mail:

Angela Schaefer Kaufmann  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>ND</sup> Floor  
PO Box 83720  
Boise, ID 83720-0100

- ☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivery  
☐ Federal Express  
☐ Facsimile: (208) 854-0872  
☐ E-Mail:

  
Deputy Clerk



STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DISTRICT

2016 JUL 28 A 9:13

CLERK DISTRICT COURT

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**


<b>STATE OF IDAHO, IDAHO STATE BOARD OF LAND COMMISSIONERS and IDAHO DEPARTMENT OF LANDS,</b>	)	<b>CASE NO. CV-2015-0001075</b>
	)	<b>AMENDED PARTIAL JUDGMENT</b>
<b>Plaintiffs,</b>	)	
	)	
<b>vs.</b>	)	
	)	
<b>PHILIP HUDSON,</b>	)	
	)	
<b>Defendant.</b>	)	
<hr/>		
<b>PHILIP HUDSON,</b>	)	
	)	
<b>Counterclaim Plaintiff,</b>	)	
<b>vs.</b>	)	
	)	
<b>STATE OF IDAHO, IDAHO STATE BOARD OF LAND COMMISSIONERS and IDAHO DEPARTMENT OF LANDS,</b>	)	
	)	
<b>Counterclaim Defendants.</b>	)	
<hr/>		

JUDGMENT IS ENTERED AS FOLLOWS:

1. Defendant Philip Hudson must:
  - a. Remove all unauthorized fill below the high water mark of Priest Lake, regardless of whether the high water mark is natural or artificial, during the low water period of Priest Lake (between November 1 and March 1);

- b. Stabilize any unstable bank or lake bed remaining landward of the high water mark of Priest Lake, regardless of whether the high water mark is natural or artificial; and
  - c. Perform any other measures recommended by the Idaho Department of Lands (“IDL”) designed to contain sediment and erosion and to restore the lake to as near its condition immediately prior to the unauthorized encroachment as possible.
2. Defendant Philip Hudson is further permanently enjoined from encroaching on, in, or above the beds or waters of Priest Lake, unless and until approval is obtained from IDL, as provided in the Lake Protection Act, Title 58, Chapter 13, Idaho Code [e](#).


DATED this 28 day of July, 2016.

  
\_\_\_\_\_  
**Barbara Buchanan**  
**District Judge**

#### **RULE 54(b) CERTIFICATE**

With respect to the issues determined by the above partial judgment it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above partial judgment is a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this 28 day of July, 2016.

  
\_\_\_\_\_  
**Barbara Buchanan**  
**District Judge**

### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid,  
this 28<sup>th</sup> day of July, 2016, to:

Angela Schaer Kaufmann  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
PO Box 83720  
Boise, ID 83720-0010

John F. Magnuson  
Attorney at Law  
1250 Northwood Center Court, Suite A  
P.O. Box 2350  
Coeur d'Alene, ID 83816

  
Deputy Clerk



STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DISTRICT

2016 AUG 12 AM 11:32

CLERK DISTRICT COURT

*LB*  
DEPUTY

JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

Attorney for Defendant/Appellant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Plaintiffs/Respondents,

vs.

PHILIP HUDSON,

Defendant/Appellant.

---

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Counterclaim Defendants.

NO. CV-15-1075

**NOTICE OF APPEAL**

**FEE CATEGORY: L.4.**

**FEE: \$129**

TO: PLAINTIFFS/RESPONDENTS STATE OF IDAHO, IDAHO STATE BOARD OF LAND COMMISSIONERS AND IDAHO DEPARTMENT OF LANDS;

AND TO: YOUR ATTORNEY OF RECORD, ANGELA SCHAER KAUFMANN, DEPUTY ATTORNEY GENERAL.

NOTICE IS HEREBY GIVEN that:

1. The above-named Appellant, Philip Hudson, appeals against the above-named Respondents (State of Idaho, Idaho State Board of Land Commissioners, and Idaho Department of Lands) from the following Order and Judgment entered in Bonner County Case No. CV-15-1075 by the District Court, the Honorable Barbara Buchanan presiding: Partial Judgment of July 22, 2016 (certified as final pursuant to IRCP 54(b)), Amended Partial Judgment of July 28, 2016 (certified as final pursuant to IRCP 54(b)), and the Memorandum Decision and Order of June 30, 2016.

2. Appellants have the right to appeal to the Idaho Supreme Court pursuant to Idaho Appellate Rule 11(a)(3).

3. The issues on appeal shall include, but not be limited to, the following:

Whether the District Court erred in granting the Plaintiffs'/Respondents' Motion for Partial Summary Judgment on the Plaintiffs' First Claim for Relief?

4. Is a reporter's transcript requested? Yes. Appellant requests a transcript of the hearing held June 22, 2016 on Plaintiffs'/Respondents' Motion for Partial Summary Judgment.

5. The Appellant requests that the following documents be included in the Clerk's Record in addition to those automatically under IAR 28:

<b><u>NUMBER</u></b>	<b><u>DOCUMENT TITLE</u></b>	<b><u>FILED/ENTERED</u></b>
1	Order Setting Trial and Pretrial Order	January 13, 2016
2	Order Setting Trial and Pretrial Order	April 18, 2016

3	State of Idaho's Motion for Partial Judgment re: State of Idaho's First Claim for Relief	April 18, 2016
4	Memorandum in Support of the State of Idaho's Motion for Summary Judgment	April 18, 2016
5	Affidavit of Mick Schanilec	April 18, 2016
6	Affidavit of Matthew Anders	April 18, 2016
7	Memorandum in Opposition to the State of Idaho's Motion for Partial Summary Judgment re: First Claim for Relief	June 9, 2016
8	Declaration of Philip Hudson	June 9, 2016
9	Declaration of Ernest M. Warner, PLS	June 9, 2016
10	Declaration of Drew C. Dittman, P.E.	June 9, 2016
11	Motion to Strike Portions of the Declaration of Ernest M. Warner, PLS and Memorandum in Support	June 15, 2016
12	Reply Memorandum in Support of State's Motion for Partial Summary Judgment re: State of Idaho's First Claim for Relief	June 15, 2016
13	Second Affidavit of Mick Schanilec	June 15, 2016
14	Notice of Hearing re: Plaintiff's Motion to Strike Portions of the Declaration of Ernest M. Warner, PLS	June 17, 2016
15	Plaintiff's Motion to Strike Portions of the Declaration of Ernest M. Warner, PLS	June 17, 2016
16	Motion to Strike the "Second Affidavit of Mick Schanilec" (filed by Plaintiff on June 15, 2016)	June 17, 2016
17	Memorandum in Support of Motion to Strike the "Second Affidavit of Mick Schanilec" (filed by Plaintiff on June 15, 2016)	June 17, 2016




18	Motion to Shorten Time	June 17, 2016
19	State's Response to Defendants' Motion to Strike the Second Affidavit of Mick Schanilec	June 20, 2016
20	Memorandum in Opposition to Motion to Strike Declaration of Ernest M. Warner, PLS	June 20, 2016
21	Memorandum Decision and Order Granting Plaintiff's Motion for Partial Summary Judgment	June 30, 2016
22	Mandatory and Permanent Injunctions	July 15, 2016
23	Stipulation for Entry of Rule 54(b) Judgment	July 20, 2016
24	Partial Judgment	July 22, 2016
25	Amended Partial Judgment - Rule 54(b) Certificate	July 28, 2016

6. I certify:

- (a) A copy of this Notice of Appeal has been served upon the Reporter;
- (b) The estimated fee for preparation of the Clerk's Record (\$100.00) has been or will be paid contemporaneously herewith;
- (c) The estimated fee for preparation of the Transcript (\$200.00) has been or will be paid contemporaneously herewith.
- (d) Service has been made on all parties required to be served pursuant to IAR 20; and
- (e) That the Appellate filing fee has been paid.

DATED this 10<sup>th</sup> day of August, 2016.

  
 JOHN F. MAGNUSON, Attorney for  
 Defendant/Appellant Philip Hudson

CERTIFICATE OF SERVICE

I hereby certify that on this 10<sup>th</sup> day of August, 2016, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

ANGELA SCHAER KAUFMANN  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
P.O. Box 83720  
Boise, ID 83720

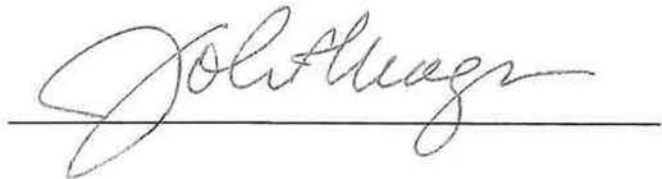
X U.S. MAIL  
       E-MAIL TRANSMISSION  
       HAND DELIVERED  
       OVERNIGHT MAIL  
       FACSIMILE - 208\854-8072

Clerk of the Court  
Bonner County Courthouse  
215 S. First Avenue  
Sandpoint, ID 83864

X U.S. MAIL  
       E-MAIL TRANSMISSION  
       HAND DELIVERED  
       OVERNIGHT MAIL  
       FACSIMILE

Valerie Larson, Court Reporter  
P.O. Box 788  
Spirit Lake, ID 83869

X U.S. MAIL  
       E-MAIL TRANSMISSION  
       HAND DELIVERED  
       OVERNIGHT MAIL  
       FACSIMILE



HUDSON.APPEAL NOTICE.wpd

STATE OF IDAHO

County of Bonner

I, Michael W. Rosedale, Clerk of the Court, do hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears in the files of the Court.

Witness my hand and seal of said Court on this

the 10 day of August, 20 16  
By Chessa Bennett Deputy



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Plaintiffs,

vs.

PHILIP HUDSON,

Defendant.

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE BOARD OF LAND  
COMMISSIONERS and IDAHO DEPARTMENT OF  
LANDS,

Counterclaim Defendants.

Case No. CV 2015-1075

PARTIAL JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

The State's Motion for Partial Summary Judgment re: State of Idaho's First Claim for Relief is **GRANTED**.

The Defendant Philip Hudson is enjoined as set forth in the Mandatory and Permanent Injunctions, filed on July 15, 2016.

DATED this 22 day of July, 2016.

Barbara Buchanan  
District Judge



## RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment and order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this 22 day of July, 2016.



**Barbara Buchanan**  
District Judge

## STATE OF IDAHO

County of Bonner

I, Michael W. Bennett, Clerk of the District Court of the  
First Judicial District of the State of Idaho, in and for the  
County of Bonner, do hereby certify that the foregoing  
instrument is a true and correct copy of the original  
thereof now on file in this office, except as redacted by  
law. Witness my hand and seal of said Court on this

the 16 day of August, 20 16.

BONNER COUNTY CLERK

By Luca Bennett Deputy



FILED  
2014 JUL 23 A 9 13  
DISTRICT COURT

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE	)	
BOARD OF LAND COMMISSIONERS	)	CASE NO. CV-2015-0001075
and IDAHO DEPARTMENT OF LANDS,	)	
	)	AMENDED PARTIAL JUDGMENT
Plaintiffs,	)	
	)	
vs.	)	
	)	
PHILIP HUDSON,	)	
	)	
Defendant.	)	
_____	)	
	)	
PHILIP HUDSON,	)	
	)	
Counterclaim Plaintiff,	)	
vs.	)	
	)	
STATE OF IDAHO, IDAHO STATE	)	
BOARD OF LAND COMMISSIONERS	)	
and IDAHO DEPARTMENT OF LANDS,	)	
	)	
Counterclaim Defendants.	)	
_____	)	

JUDGMENT IS ENTERED AS FOLLOWS:

1. Defendant Philip Hudson must:
  - a. Remove all unauthorized fill below the high water mark of Priest Lake, regardless of whether the high water mark is natural or artificial, during the low water period of Priest Lake (between November 1 and March 1);

- b. Stabilize any unstable bank or lake bed remaining landward of the high water mark of Priest Lake, regardless of whether the high water mark is natural or artificial; and
  - c. Perform any other measures recommended by the Idaho Department of Lands (“IDL”) designed to contain sediment and erosion and to restore the lake to as near its condition immediately prior to the unauthorized encroachment as possible.
2. Defendant Philip Hudson is further permanently enjoined from encroaching on, in, or above the beds or waters of Priest Lake, unless and until approval is obtained from IDL, as provided in the Lake Protection Act, Title 58, Chapter 13, Idaho Code.

DATED this 28 day of July, 2016.



**Barbara Buchanan**  
District Judge

#### **RULE 54(b) CERTIFICATE**

With respect to the issues determined by the above partial judgment it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above partial judgment is a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this 28 day of July, 2016.



**Barbara Buchanan**  
District Judge

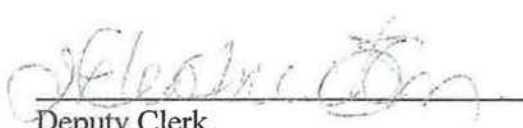


### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 28<sup>th</sup> day of July, 2016, to:

Angela Schaer Kaufmann  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
PO Box 83720  
Boise, ID 83720-0010

John F. Magnuson  
Attorney at Law  
1250 Northwood Center Court, Suite A  
P.O. Box 2350  
Coeur d'Alene, ID 83816

  
Deputy Clerk

STATE OF IDAHO  
County of Bonner  
I, Michelle W. Heston, Clerk of the District Court of the  
First and Second Judicial Districts of the State of Idaho, in and for the  
County of Bonner, do hereby certify that the foregoing  
instrument is a true and correct copy of the original  
thereof as on file in this office, except as redacted by  
law. Witness my hand and seal of said Court on this  
the 11<sup>th</sup> day of August, 20 16.  
BONNER COUNTY CLERK  
By Luca Bennett Deputy



STATE OF IDAHO  
COUNTY OF BONNER  
2016 JUL 30 A 11:33  
CLERK OF DISTRICT COURT

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

**STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,**

**Plaintiffs,**

**vs.**

**PHILIP HUDSON,**

**Defendant.**

**CASE NO. CV-2015-0001075**

**MEMORANDUM DECISION AND  
ORDER GRANTING PLAINTIFFS'  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

**PHILIP HUDSON,**

**Counterclaim Plaintiff,**

**vs.**

**STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,**

**Counterclaim Defendants.**

THIS MATTER came before the Court on June 22, 2016, for a hearing on the State of Idaho's Motion for Partial Summary Judgment re: State of Idaho's First Claim for Relief, and Motion to Strike Portions of the Declaration of Ernest M. Warner, PLS; and Defendant's Motion to Shorten Time, and Motion to Strike the "Second Affidavit of Mick Schanilec." Plaintiffs State of Idaho, Idaho State Board of Land Commissioners and Idaho Department of Lands

(collectively, “State of Idaho”) are represented by Deputy Attorney General Angela Schaer Kaufmann. Defendant Philip Hudson is represented by attorney John F. Magnuson.

Both counsel and Mr. Hudson were present in the courtroom.

## I. INTRODUCTION

Priest Lake is a navigable lake located in Bonner County, Idaho. Priest Lake was a navigable lake at the time Idaho was admitted to the Union on July 3, 1890, and continued to be navigable from that date to the present. *Verified Complaint* (filed July 13, 2015), at ¶ 6; *Answer and Counterclaim* (filed September 21, 2015), at ¶¶ 2, 6,

In July 2014, the Idaho Department of Lands (“IDL”) investigated a complaint about an unauthorized encroachment in Priest Lake adjacent to the upland property owned by Philip Hudson. *Affidavit of Mick Schanilec* (filed April 18 2016), at ¶ 7. IDL reviewed historical aerial photos and noted what appeared to be a lakebed fill area consisting of an elevated beach and a sea wall adjacent to the Hudson property. *Id.* Hudson did not obtain a lake encroachment permit for this fill. *Id.* at ¶ 9. The fill consists of sand, soil, rocks, cement and seedlings that have either been planted or have seeded in since the establishment of the fill. *Id.* at ¶ 10. IDL has repeatedly attempted to have Hudson remove the unauthorized fill, but he has declined. *Id.* at ¶ 12.

On July 13, 2015, the State of Idaho, Idaho State Board of Land Commissioners (“Board”) and the IDL filed a Verified Complaint against Philip Hudson. The State, first, alleges a violation of the Lake Protection Act and seeks a mandatory injunction ordering the removal of the unauthorized fill; and second, alleges trespass on State lands and seeks permanent injunctive relief. Hudson counterclaimed. This case is set for a court trial to begin on November 29, 2016.

The State now moves for summary judgment on its first claim for relief.



## II. SUMMARY JUDGMENT STANDARD

In *Johnson v. McPhee*, 147 Idaho 455, 210 P.3d 563 (Ct. App. 2009), the Idaho Supreme Court set forth the standard for summary judgment, as follows:

**Summary judgment may be entered only if “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”** Idaho Rule of Civil Procedure 56(c). *See also Avila v. Wahlquist*, 126 Idaho 745, 747, 890 P.2d 331, 333 (1995); *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene*, 126 Idaho 740, 742, 890 P.2d 326, 328 (1995). When a summary judgment motion has been supported by depositions, affidavits or other evidence, the adverse party may not rest upon the mere allegations or denials of that party's pleadings, but by affidavits or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial. I.R.C.P. 56(e). *See also Gardner v. Evans*, 110 Idaho 925, 929, 719 P.2d 1185, 1189 (1986). In order to survive a motion for summary judgment the plaintiff need not prove that an issue will be decided in its favor at trial; rather, it must simply show that there is a triable issue. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 524, 808 P.2d 851, 861 (1991). **A mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment; there must be sufficient evidence upon which a jury could reasonably return a verdict for the party opposing summary judgment.** *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986); *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 871, 452 P.2d 362, 368 (1969). ...

When a court considers a motion for summary judgment in a case that would be tried to a jury, all facts are to be liberally construed, and all reasonable inferences must be drawn in favor of the party resisting the motion. *G & M Farms*, 119 Idaho at 517, 808 P.2d at 854; *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994). **The rule is different however when, as here, a jury trial has not been requested. In that event, because the court would be the fact-finder at trial, on a summary judgment motion the court is entitled to draw the most probable inferences from the undisputed evidence properly before it, and may grant the summary judgment despite the possibility of conflicting inferences.** *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007); *Intermountain Forest Mgmt., Inc. v. Louisiana Pacific Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001); *Brown v. Perkins*, 129 Idaho 189, 191, 923 P.2d 434, 436 (1996). **Inferences thus drawn by a trial court will not be disturbed on appeal if the record reasonably supports them.** *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 360–61, 93 P.3d 685, 691–92 (2004); *Intermountain Forest Mgmt., Inc.*, 136 Idaho at 236, 31 P.3d at 924.

*Id.* at 459-460, 210 P.3d at 567-568. (Emphasis supplied).

### III. DISCUSSION

#### A. Defendant Hudson's lakebed fill is an encroachment not in aid of navigation.

Idaho Code § 58-1302 provides, in relevant part:

(h) "Encroachments in aid of navigation" means and includes docks, piers, floats, pilings, breakwaters, boat ramps, channels or basins, and other such aids to the navigability of the lake, on, in or above the beds or waters of a navigable lake. The term "encroachments in aid of navigation" may be used interchangeably herein with the term "navigational encroachments."

(i) "Encroachments not in aid of navigation" means and includes all other encroachments on, in or above the beds or waters of a navigable lake, **including landfills or other structures not constructed primarily for use in aid of the navigability of the lake.** The term "encroachments not in aid of navigation" may be used interchangeably herein with the term "nonnavigational encroachments."

I.C. § 58-1302(h), (i). (Emphasis supplied).

Similarly, Idaho Administrative Code 20.03.17.010, provides, in relevant part:

09. Encroachments in Aid of Navigation. Includes docks, piers, jet ski and boat lifts, buoys, pilings, breakwaters, boat ramps, channels or basins, and **other facilities used to support water craft and moorage on, in, or above the beds or waters of a navigable lake, river or stream.** The term "encroachments in aid of navigation" may be used interchangeably herein with the term "navigational encroachments."

10. Encroachments Not in Aid of Navigation. Includes all other encroachments on, in, or above the beds or waters of a navigable lake, river or stream, **including landfills, bridges, utility and power lines, or other structures not constructed primarily for use in aid of navigation.** It shall also include float homes and floating toys. The term "encroachments not in aid of navigation" may be used interchangeably herein with the term "non-navigational encroachments."

IDAPA 20.03.17.010 (09),(10). (Emphasis supplied).

Hudson's lakebed fill is not a facility that is "used to support water craft and moorage on, in, or above the beds or waters of a navigable lake, river or stream." IDAPA 20.03.17.010(09). Rather, it is a structure "not constructed primarily for use in aid of navigation," IDAPA 20.03.17.010(10). Therefore, the Court finds that it is an encroachment not in aid of navigation.

**B. The State of Idaho has the power to regulate and control navigatiuonal and nonnavigational encroachments.**

Under Idaho Code § 58-1303, the Board “shall regulate, control and may permit encroachments in aid of navigation or not in aid of navigation on, in or above the beds or waters of navigable lakes ....” I.C. § 58-1303. Applications for construction, enlargement or replacement of a nonnavigational encroachment must be made to the Board, as set forth in Idaho Code § 58-1306. If such application is approved, a permit shall be issued and recorded in the records of the county in which the encroachment is located. I.C. § 58-1306. Here, it is undisputed that Hudson did not obtain a permit for the lakebed fill.

**C. The bed of Priest Lake includes the land lying between the ordinary and artificial high water mark.**

It is undisputed that Priest Lake is a navigable lake. Idaho Code § 58-1302 defines the bed of a navigable lake, as follows:

“Beds of navigable lakes” means the lands lying under or below the “natural or ordinary high water mark” of a navigable lake and, for purposes of this act only, **the lands lying between the natural or ordinary high water mark and the artificial high water mark, if there be one.**

I.C. § 58-1302(b). (Emphasis supplied).

In his Memorandum in Opposition to the State of Idaho’s Motion for Partial Summary Judgment Re: First Claim for Relief, filed June 9, 2016, Hudson agrees that the State of Idaho owns in trust for the public title to the bed of Priest Lake below the Ordinary High Water Mark (OHWM) as it existed on July 3, 1890, but contends that there are material issues of fact as to the location of the OHWM as of that date. Hudson claims that an artificial high water mark (AHWM) is created by the dam during the summer months, and that the AHWM is higher than



the OHWM. Hudson argues that that the fill at issue in this case is located upland of the OHWM, on property not owned by the State, but on his property.

The Court finds that pursuant to the definition of a lakebed in Idaho Code § 58-1302, it does not matter whether the fill is located below the OHWM, or between the OHWM and the AHWM, if there is one; because the statute makes clear that the State of Idaho has the power to regulate and control encroachments on land lying between the OHWM and the AHWM.

Accordingly, the State of Idaho has the power, as a matter of law, to regulate and control encroachments in or above the bed of Priest lake by requiring that a lake encroachment permit be obtained before construction of a nonnavigational encroachment such as the fill at issue here.

\*\*\*\*\*

Construing all the undisputed facts liberally, and drawing the most probable inferences from the undisputed evidence in favor of Hudson,<sup>1</sup> the Court finds there is no genuine issue of material fact for trial as to the authority of the State of Idaho to require Hudson to apply for and obtain a permit for the construction of lakebed fill. Hudson having failed to obtain such a permit, the Court grants the State of Idaho's motion for partial summary judgment.

**D. The parties' Motions to Strike are moot.**

The Declaration of Ernest M. Warner, PLS, which the State of Idaho has moved to strike, and the Second Affidavit of Mick Schanilec, which Hudson has moved to strike, were not considered in reaching the Court's decision. Therefore, the motions to strike are moot.

**IV. CONCLUSION AND ORDER**

NOW, THEREFORE, based upon the foregoing, IT IS HEREBY ORDERED THAT:

---

<sup>1</sup> As noted earlier, this is the standard for a court trial. However, even applying the more liberal standard for a jury trial, i.e., drawing all *reasonable* inferences from the undisputed evidence in favor of Hudson, the result is the same.

1. The State of Idaho's Motion to Strike Portions of the Declaration of Ernest M. Warner is MOOT.
2. Defendant's Motion to Strike the Second Affidavit of Mick Schanilec is MOOT.
3. Defendant's Motion to Shorten Time is GRANTED.
4. The State of Idaho's Motion for Partial Summary Judgment re: State of Idaho's First Claim for Relief is GRANTED.


IT IS FURTHER ORDERED THAT:

5. A mandatory injunction shall issue ordering Defendant Hudson to:
  - a. Remove all unauthorized fill below the high water mark of Priest Lake, regardless of whether the high water mark is natural or artificial, during the low water period of Priest Lake (between November 1 and March 1);
  - b. Stabilize any unstable bank or lake bed remaining landward of the high water mark of Priest Lake, regardless of whether the high water mark is natural or artificial; and
  - c. Perform any other measures recommended by IDL designed to contain sediment and erosion and to restore the lake to as near its condition immediately prior to the unauthorized encroachment as possible.
6. A permanent injunction shall issue ordering Defendant Hudson to refrain from encroaching on, in, or above the beds or waters of Priest Lake, unless and until approval is obtained from IDL, as provided in the Lake Protection Act.

The State is ordered to prepare the proposed injunctions consistent with this Order, and to submit them to the Court for entry within (14) days of the date of this Order.

IT IS SO ORDERED

DATED this 30 day of June, 2016.

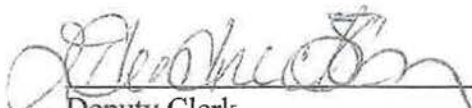
  
\_\_\_\_\_  
Barbara Buchanan  
District Judge

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 30 day of June, 2016, to:

Angela Schaer Kaufmann  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
PO Box 83720  
Boise, ID 83720-0010

John F. Magnuson  
Attorney at Law  
1250 Northwood Center Court, Suite A  
P.O. Box 2350  
Coeur d'Alene, ID 83816

  
\_\_\_\_\_  
Deputy Clerk

STATE OF IDAHO

County of Bonner

I, Michael W. Rose, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner, do hereby certify that the foregoing instrument is a true and correct copy of the original thereof now on file in this office, except as redacted by law. Witness my hand and seal of said Court on this the 10 day of August, 20 16.

  
By Quia Bennett Deputy  
BONNER COUNTY CLERK



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO  
IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO,  
Plaintiff / Respondent,  
vs.  
PHILIP HUDSON,  
Defendant / Appellant.

CLERK'S CERTIFICATE OF APPEAL

Supreme Court Docket No.  
Bonner County Case No. CV-2015-1075

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DISTRICT  
2016 AUG 16 A 8:2  
CLERK DISTRICT COURT  
*YLB*  
DEPUTY

Appeal from: First Judicial District, Bonner County.

Honorable BARBARA BUCHANAN, presiding.

Case number from Court: CV-2015-1075

Order or Judgment appealed from: Order and Judgment entered in CV-2015-1075; Partial Judgment of July 22, 2016; Amended Partial Judgment of July 28, 2016 (certified as final pursuant to IRCP 54(B)), and Memorandum Decision and Order of June 30, 2016.

Attorney for Appellant:

John F. Magnuson

Attorney for Respondent:

Lawrence G. Wasden

Appealed by:

Philip Hudson

Appealed against:

Commissioners and Idaho Department of Lands

State of Idaho, Idaho State Board of Land

Notice of Appeal Filed:

August 12, 2016

Appellate Fee Paid:

YES

Was District Court Reporter's Transcript Requested?

YES

If so, name or reporter:

Valerie Larson

Estimated Fee for Transcripts Paid?

YES

Estimated Fee for Preparation of Clerk's Record Paid?

YES

Dated this 16 day of August, 2016.

MICHAEL W. ROSEDALE  
CLERK OF THE DISTRICT COURT

BY *[Signature]*  
DEPUTY CLERK

Clerk's Certificate of Appeal -1-

JOHN F. MAGNUSON  
ATTORNEY AT LAW

ADMITTED IN IDAHO AND WASHINGTON

TELEPHONE  
208•667•0100

FAX  
208•667•0500

P.O. Box 2350  
1250 NORTHWOOD CENTER COURT  
SUITE A  
COEUR D'ALENE  
IDAHO 83816

5230616 JUL 12  
COUNTY OF BONNER  
FIRST JUDICIAL DISTRICT  
2016 AUG 18 P 1:51  
CLERK DISTRICT COURT  
  
DEPUTY

August 16, 2016

The Honorable Barbara A. Buchanan  
District Court Judge  
215 S. First Avenue  
Sandpoint, ID 83864

Re: State of Idaho v. Hudson  
Bonner County Case No. CV-15-1075

Dear Judge Buchanan:

The Court's July 28, 2016 "Notice to Counsel," filed contemporaneous with the Court's Order staying further proceedings, requested that the Court be advised if an appeal was filed. I enclose a courtesy copy of the Notice of Appeal, which was separately filed with the Clerk on August 12, 2016.

Thank you.

Sincerely,

  
John F. Magnuson

JFM/js  
Encl.

cc: Angela Schaer Kaufmann (w/encl.)  
Client (w/encl.)  
BUCHANAN.LTR6.wpd

JOHN F. MAGNUSON  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814  
Phone: (208) 667-0100  
Fax: (208) 667-0500  
ISB #04270

Attorney for Defendant/Appellant

COUNTY OF BONNER  
FIRST JUDICIAL DISTRICT  
2016 APR 18 P 1:51  
CLERK DISTRICT COURT  
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Plaintiffs/Respondents,

vs.

PHILIP HUDSON,

Defendant/Appellant.

PHILIP HUDSON,

Counterclaim Plaintiff,

vs.

STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
and IDAHO DEPARTMENT OF LANDS,

Counterclaim Defendants.

NO. CV-15-1075

**NOTICE OF APPEAL**

**FEE CATEGORY: L.4.**

**FEE: \$129**



TO: PLAINTIFFS/RESPONDENTS STATE OF IDAHO, IDAHO STATE BOARD OF LAND COMMISSIONERS AND IDAHO DEPARTMENT OF LANDS;

AND TO: YOUR ATTORNEY OF RECORD, ANGELA SCHAEER KAUFMANN, DEPUTY ATTORNEY GENERAL.

NOTICE IS HEREBY GIVEN that:

1. The above-named Appellant, Philip Hudson, appeals against the above-named Respondents (State of Idaho, Idaho State Board of Land Commissioners, and Idaho Department of Lands) from the following Order and Judgment entered in Bonner County Case No. CV-15-1075 by the District Court, the Honorable Barbara Buchanan presiding: Partial Judgment of July 22, 2016 (certified as final pursuant to IRCP 54(b)), Amended Partial Judgment of July 28, 2016 (certified as final pursuant to IRCP 54(b)), and the Memorandum Decision and Order of June 30, 2016.

2. Appellants have the right to appeal to the Idaho Supreme Court pursuant to Idaho Appellate Rule 11(a)(3).

3. The issues on appeal shall include, but not be limited to, the following:

Whether the District Court erred in granting the Plaintiffs'/Respondents' Motion for Partial Summary Judgment on the Plaintiffs' First Claim for Relief?

4. Is a reporter's transcript requested? Yes. Appellant requests a transcript of the hearing held June 22, 2016 on Plaintiffs'/Respondents' Motion for Partial Summary Judgment.

5. The Appellant requests that the following documents be included in the Clerk's Record in addition to those automatically under IAR 28:

<u>NUMBER</u>	<u>DOCUMENT TITLE</u>	<u>FILED/ENTERED</u>
1	Order Setting Trial and Pretrial Order	January 13, 2016
2	Order Setting Trial and Pretrial Order	April 18, 2016

3	State of Idaho's Motion for Partial Judgment re: State of Idaho's First Claim for Relief	April 18, 2016
4	Memorandum in Support of the State of Idaho's Motion for Summary Judgment	April 18, 2016
5	Affidavit of Mick Schanilec	April 18, 2016
6	Affidavit of Matthew Anders	April 18, 2016
7	Memorandum in Opposition to the State of Idaho's Motion for Partial Summary Judgment re: First Claim for Relief	June 9, 2016
8	Declaration of Philip Hudson	June 9, 2016
9	Declaration of Ernest M. Warner, PLS	June 9, 2016
10	Declaration of Drew C. Dittman, P.E.	June 9, 2016
11	Motion to Strike Portions of the Declaration of Ernest M. Warner, PLS and Memorandum in Support	June 15, 2016
12	Reply Memorandum in Support of State's Motion for Partial Summary Judgment re: State of Idaho's First Claim for Relief	June 15, 2016
13	Second Affidavit of Mick Schanilec	June 15, 2016
14	Notice of Hearing re: Plaintiff's Motion to Strike Portions of the Declaration of Ernest M. Warner, PLS	June 17, 2016
15	Plaintiff's Motion to Strike Portions of the Declaration of Ernest M. Warner, PLS	June 17, 2016
16	Motion to Strike the "Second Affidavit of Mick Schanilec" (filed by Plaintiff on June 15, 2016)	June 17, 2016
17	Memorandum in Support of Motion to Strike the "Second Affidavit of Mick Schanilec" (filed by Plaintiff on June 15, 2016)	June 17, 2016

18	Motion to Shorten Time	June 17, 2016
19	State's Response to Defendants' Motion to Strike the Second Affidavit of Mick Schanilec	June 20, 2016
20	Memorandum in Opposition to Motion to Strike Declaration of Ernest M. Warner, PLS	June 20, 2016
21	Memorandum Decision and Order Granting Plaintiff's Motion for Partial Summary Judgment	June 30, 2016
22	Mandatory and Permanent Injunctions	July 15, 2016
23	Stipulation for Entry of Rule 54(b) Judgment	July 20, 2016
24	Partial Judgment	July 22, 2016
25	Amended Partial Judgment - Rule 54(b) Certificate	July 28, 2016

6. I certify:

- (a) A copy of this Notice of Appeal has been served upon the Reporter;
- (b) The estimated fee for preparation of the Clerk's Record (\$100.00) has been or will be paid contemporaneously herewith;
- (c) The estimated fee for preparation of the Transcript (\$200.00) has been or will be paid contemporaneously herewith.
- (d) Service has been made on all parties required to be served pursuant to IAR 20; and
- (e) That the Appellate filing fee has been paid.

DATED this 10<sup>th</sup> day of August, 2016.

  
 JOHN F. MAGNUSON, Attorney for  
 Defendant/Appellant Philip Hudson



CERTIFICATE OF SERVICE

I hereby certify that on this 10<sup>th</sup> day of August, 2016, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

ANGELA SCHAER KAUFMANN  
Deputy Attorney General  
Idaho Department of Lands  
700 W. State Street, 2<sup>nd</sup> Floor  
P.O. Box 83720  
Boise, ID 83720

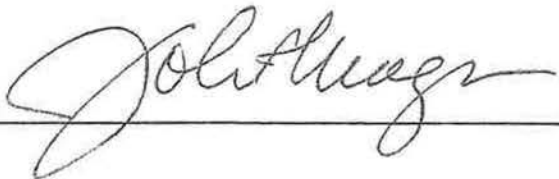
  X   U.S. MAIL  
      E-MAIL TRANSMISSION  
      HAND DELIVERED  
      OVERNIGHT MAIL  
      FACSIMILE - 208\854-8072

Clerk of the Court  
Bonner County Courthouse  
215 S. First Avenue  
Sandpoint, ID 83864

  X   U.S. MAIL  
      E-MAIL TRANSMISSION  
      HAND DELIVERED  
      OVERNIGHT MAIL  
      FACSIMILE

Valerie Larson, Court Reporter  
P.O. Box 788  
Spirit Lake, ID 83869

  X   U.S. MAIL  
      E-MAIL TRANSMISSION  
      HAND DELIVERED  
      OVERNIGHT MAIL  
      FACSIMILE



HUDSON.APPEAL NOTICE.wpd

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, IDAHO STATE	)	SUPREME COURT NO. 44418
BOARD OF LAND COMMISSIONERS	)	BONNER COUNTY CV-2015-1075
And IDAHO DEPARTMENT OF LANDS,	)	
Plaintiff/ Respondent,	)	
	)	
vs.	)	CLERK'S CERTIFICATE
PHILIP HUDSON	)	
	)	
	)	
Defendant/ Appellant,	)	
_____	)	

I, Michael W. Rosedale, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner, do certify that the foregoing Record in this cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents requested by Appellant Rule 28.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 28 day of September, 2016.

Michael W. Rosedale,  
Clerk of the District Court

Chiss B  
Deputy Clerk



STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS  
And IDAHO DEPARTMENT OF LANDS,  
Plaintiff/ Respondent,

PHILIP HUDSON

Defendant/ Appellant,

CLERK'S  
CERTIFICATE OF EXHIBITS

Affidavit of Matthew Anders -Exhibit B on CD filed April 18, 2016

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 28 day of September, 2016.

Michael W. Rosedale  
Clerk of the District Court

Deputy Clerk



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